Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

October Term, 1997

STEVE SEALE,

*Petitioner,*

v.

JASPER HOSPITAL DISTRICT,

*Respondent.*

**On Petition For Writ Of Certiorari To The Court Of Appeals For The Ninth District Of Texas At Beaumont**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED FOR REVIEW

Whether, under U.S. CONST. amend. I, a political subdivision and taxing authority of a State formed to operate a hospital or hospital system may, by contract, change a secular government hospital into a denominational hospital.

Whether, under U.S. CONST. amend. I, a political subdivision and taxing authority of a State may lease all property used by it for its governmental purpose to an instrumentality of a church when the property will be used by the religious entity for a religious purpose.

Whether, under U.S. CONST. amend. I, a political subdivision of a State formed to operate a hospital or hospital system may enter an exclusive contract for the performance of its governmental function with an entity which is an instrumentality of a church, the purposes of which entity must be conducted in the context of the theology of that denomination.

Whether, under U.S. CONST. amend. I, a political subdivision of a State formed to operate a hospital or hospital system may agree, in a contract with the sole operator of its hospital system, that the services to be provided by the operator in performance of the political subdivision's governmental function shall be limited to services which do not violate the ethical policies of and the religious and ethical directives promulgated by a certain council of a church.

## LIST OF PARTIES

All parties to the proceeding in the court whose judgment is sought to be reviewed are listed below:

1) Steve Seale
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(Petitioner herein and appellant in the court below)

2) Jasper Hospital District
1275 Marvin Hancock Drive
Jasper, Texas 75951
(409) 384-5461
(Respondent herein and appellee in the court below)

3) Jasper Memorial Hospital Foundation, Inc.
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(Appellee in the court below)

There is no parent or subsidiary company to be listed.

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## PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Steve Seale, respectfully petitions for a writ of certiorari to review the judgment and opinion of the Court of Appeals for the Ninth District of Texas at Beaumont entered in this proceeding on October 2, 1997.

## OPINION BELOW

The opinion of the Court of Appeals for the Ninth District of Texas at Beaumont, Texas (App. – 1) was not published.

## JURISDICTION

The Court of Appeals for the Ninth District of Texas, on rehearing, entered its judgment (App. – 13) on October 2, 1997. Petitioner's petition for review to the Supreme Court of Texas, filed on November 6, 1997, was denied by the Supreme Court of Texas on January 8, 1998 (App. – 14). Petitioner's motion for rehearing of the denial of his petition for review, filed on January 26, 1998, was overruled by the Supreme Court of Texas on February 26, 1998 (App. – 15). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

U.S. CONST. amend. I, Establishment Clause (App. – 16)

U.S. CONST. amend. XIV, Section 1 (App. – 16)

## STATEMENT OF THE CASE

Petitioner sued Respondent Jasper Hospital District to enjoin it permanently from entering a proposed lease and operating agreement with the Sisters of Charity of the Incarnate Word, Houston, Texas, and for declaratory judgment that the proposed lease and operating agreement is void and illegal under U.S. CONST. amend. I, Establishment Clause.

The terms of the proposed lease and operating agreement are set forth in a letter of intent between Jasper Hospital District and Sisters of Charity of the Incarnate Word, Houston, Texas (App. – 88).

### A. Parties to the Letter of Intent

Respondent, Jasper Hospital District, is a political subdivision and taxing authority of the State of Texas, the purposes of which are to maintain and operate a hospital or hospital system within the District's boundaries (App. – 47). It has full responsibility for providing medical and hospital care for its needy inhabitants. TEX. CONST. art. IX, § 9.

Sisters of Charity of the Incarnate Word, Houston, Texas is a Texas non-profit corporation "formed to carry on Jesus Christ's healing ministry by providing health

care * * * " (App. – 98 at App. – 108). It and the entities of the SCH (Sisters of Charity – Houston) Health Care System "are and always shall be instrumentalities of the Roman Catholic Church" (App. – 113). It and the SCH entities "shall be managed and directed according to the doctrines, disciplines, laws, rules and regulations of the Roman Catholic Church, the constitutions, directives, resolutions and decrees of the Congregation, and the ethical and religious directives for Catholic health facilities as approved by the National Conference of Catholic Bishops" (App. – 113).

**B. Terms of the Letter of Intent and Proposed Agreement**

The letter of intent between Jasper Hospital District and Sisters of Charity (App. – 88), effective November 22, 1994, sets forth the terms of an impending lease by Jasper Hospital District of its hospital, its clinics, and related assets to Sisters of Charity and which sets down the manner in which the Sisters of Charity would operate the leased hospital, clinics, and assets.

The letter of intent provides that Jasper Hospital District enter a lease-operating agreement under which the Sisters of Charity would "not be required to provide services which violate Sisters of Charity of the Incarnate Word's Ethical Policies and the Religious and Ethical Directives for Catholic Health Facilities as promulgated by the National Conference of Catholic Bishops" (App. – 91).

The letter of intent also provides that "SCH contemplates creating a regional board for its Southeast Texas

facilities, which would include Jasper Memorial Hospital if the transaction contemplated by this letter is completed. In such event it is intended that the Jasper Memorial Hospital Board or the District will have representation on the regional board along with representatives of other SCH facilities within the Southeast Texas region" (App. – 92).

The agreement contemplated by the letter of intent would also provide that Sisters of Charity will pay an annual rental for a ten year term for the lease of the District's hospital, office, and clinics, will pay $905,000.00 of the District's long term debt and short term notes payable, and will make available additional capital for operating the hospital system in accord with legal charity care, government sponsored indigent care, and community benefits requirements applicable to the hospital district (App. – 90).

**C. Petitioner as Plaintiff**

Petitioner is a domiciliary and a taxpayer of Jasper Hospital District who does not subscribe to all of the theology, philosophy, and other teachings and norms of the Roman Catholic Church. His family physician is on Jasper Memorial Hospital's staff, and he does not desire "to be bound to receive only such medical services as are in keeping with the Religious and Ethical Directives for Catholic Health Facilities as promulgated by the National Conference of Catholic Bishops and any other tenets and teachings of the Roman Catholic Church" (App. – 117).

**D. Proceedings Below**

The federal questions sought to be reviewed have been raised since the filing of Petitioner's action in the court of first instance and were raised as bases for reversal of the trial court in the Court of Appeals for the Ninth District of Texas and in the Supreme Court of Texas. The time and the method or manner the federal questions were raised and the time and way in which they were passed upon by the court of first instance and the Texas appellate courts, pertinent quotations of portions of the record, or summaries thereof, with specific reference to the places in the record where the matter appears, so as to show that the federal questions were timely and properly raised and that this Court has jurisdiction to review the judgment on a writ of certiorari are set forth in Petitioner's Rule 14(g)(i) Statement (App. – 17).

In the trial court, Respondent moved for summary judgment, alleging Petitioner has no standing to sue the Respondent District, that the District has legal authority to enter the contemplated agreement, that there is no justiciable controversy between the parties, that the Respondent hospital district's actions do not constitute state action, and that there would be no Establishment Clause violation (App. – 31; App. – 120). The trial court granted the motion (App. – 11).

Petitioner moved for partial summary judgment, alleging that the proposed contract between Respondent and Sisters of Charity of the Incarnate Word, Houston, Texas would be void and illegal under the Establishment Clause of the First Amendment and that he has standing

to maintain his lawsuit (App. – 72). The trial court denied Petitioner's motion (App. – 12).

Petitioner appealed to the Court of Appeals for the Ninth District of Texas, challenging the trial court's grant of summary judgment for Respondent and denial of his motion for partial summary judgment in light of Petitioner's uncontroverted summary judgment evidence (App. – 23).

The court of appeals affirmed the trial court's grant of summary judgment in favor of the Respondent District and denial of the partial summary judgment sought by Petitioner. The court cited *Bradfield v. Roberts*, 175 U.S. 291 (1899) as authority that the contemplated lease and operating contract would be permissible under the Establishment Clause; it found that the resulting denominational hospital has a constitutional right to freedom of religion; and it held that if the "denominational hospital must give up its rights of religion in order to lease the Jasper Memorial Hospital", the result would be hostility, and not neutrality, toward religion (App. – 1).

The Supreme Court of Texas denied Petitioner's petition for review (App. – 14) and overruled his motion for rehearing the denial of the petition for review (App. – 15).

## REASONS FOR GRANTING THE WRIT

### 1. THE STATE COURT OF LAST RESORT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

**A. The court below erred in applying *Bradfield v. Roberts*, in which the propriety of a government lease to a neutral, secular entity was questioned, to the instant case, in which the validity of a lease and operating agreement between a governmental subdivision and a religious entity is in issue. Its resulting decision conflicts with this Court's ruling that a facility constructed with tax proceeds cannot be used for a sectarian purpose.**

The court of appeals, applying *Bradfield v. Roberts*, 175 U.S. 291 (1899), held that the District's lease to the Sisters of Charity would be valid. Its trust in *Bradfield* as good authority is misplaced, however.

In *Bradfield*, a lease from the District of Columbia to a corporation chartered by an act of Congress was examined. The individual members of the corporation were members of a sisterhood of the Roman Catholic Church; however, the Court found the individual members' faith was immaterial as to whether the lease to the corporation was void under the Establishment Clause. The *Bradfield* corporation's charter said nothing about the religious faith of the incorporators, and in it, the corporation was not "declared the trustee of any church or religious society." The corporation was "subject to no visitation, supervision, or control by any ecclesiastical authority

whatever, but only to that of the government which created it." *Bradfield*, 175 U.S. at 299.

In the present case, the corporate entity's articles of incorporation state that it was formed "to carry on Jesus Christ's healing ministry by providing health care" (App. – 98 at App. – 108) "according to the doctrines, disciplines, laws, rules and regulations of the Roman Catholic Church, the constitutions, directives, resolutions, and decrees of the Congregation and the ethical and religious directives for Catholic health facilities as approved by the National Conference of Catholic Bishops" (App. – 98 at App. – 113). Sisters of Charity and the resulting hospital are "instrumentalities of the Roman Catholic Church" (App. – 98 at App. – 113). Accordingly, the court below was correct in its conclusion that the hospital to be operated by Sisters of Charity of the Incarnate Word, Houston, Texas at Respondent Jasper Hospital District's hospital and clinics would be a denominational hospital (App. – 1 at App. – 9).

Because the resulting hospital is or would be a denominational hospital, operated in facilities acquired with expenditures of the Respondent hospital district's funds, *Tilton v. Richardson*, 403 U.S. 672 (1971) should have been applied to the facts of this case. Although the *Tilton* Court was divided in its ruling that certain construction grants to religious colleges were permissible, the Court was unanimous in its rejection of a clause in the challenged federal statute which would have allowed a religious institution to use tax-funded construction for a sectarian purpose at the expiration of a twenty-year period. The Court held that use of tax-raised funds to construct a facility which might be used for sectarian

activities is impermissible under the Establishment Clause.

The decision below is contrary to *Tilton v. Richardson* because use of facilities constructed with Respondent District's tax-raised funds for the denominational hospital's purpose, the healing ministry of Jesus Christ, will, or did begin to, occur upon consummation of the intended lease.

It is noteworthy that the court below decided Sisters of Charity's right to freely exercise its religion outweighs the District's Establishment Clause constraints (App. – 9). The court below erred in that holding, also, for "the principal that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause". *Lee v. Weisman*, 505 U.S. 577 (1992).

**B. The decision below conflicts with prior decisions of this Court which hold that a political subdivision of a State cannot prefer one religious denomination.**

"The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228 (1982); *Everson v. Board of Education*, 330 U.S. 1 (1947); *Abington School District v. Schempp*, 374 U.S. 203 (1963).

The Framers of the Constitution "intended the Establishment Clause to prohibit the designation of any church as a 'national' one. The Clause was also designed to stop the Federal Government from asserting a preference for one religious denomination or sect over others. . . . [V]ia

the Fourteenth Amendment . . . , States are prohibited as well from establishing a religion or discriminating between sects." *Wallace v. Jaffree*, 472 U.S. 38 (1985) (REHNQUIST, J., dissenting, at 113).

In this case, Jasper Hospital District has agreed that its hospital, clinics, and other assets will be used by an instrumentality of the Roman Catholic Church. That entity's purposes are to be carried out in accord with the Roman Catholic Church's doctrines and rules and the directives for Catholic health facilities as approved by the National Conference of Catholic Bishops. The District has agreed that the medical services provided at the District's hospital and clinics will not include any services violative of the Sisters of Charity's ethical policies and certain ethical and religious directives for Catholic health facilities promulgated by the National Conference of Catholic Bishops (App. – 91). The Sisters of Charity's articles of incorporation provide that SCH and all its entities are and always shall be instrumentalities of the Roman Catholic Church (App. – 113). Further, the letter of intent provides for the District to be represented on a regional Sisters of Charity board with representatives from other SCH entities (App. – 92).

In short, the District's property will be, or is being, used by the Roman Catholic Church, and no other church or sect, and its services will be determined in accord with doctrines and rules promulgated by the Roman Catholic Church and its conference of bishops, and by no other church or denomination. It has agreed to join a contemplated regional assembly of other instrumentalities of the Roman Catholic Church (App. – 92). Although there is no express statement in the letter of intent that the Roman

Catholic Church is the official religion of the District, the provisions of the letter of intent and SCH's articles which limit available services to those approved by the conference of bishops of the Roman Catholic Church is, in effect, an official establishment of that church as the religion of the District.

The property the subject of the contemplated agreement is the Jasper Memorial Hospital, its clinics, and all the District's operating and related assets. The letter of intent states that "SCH intends to lease all of the District's rights" to an extensive list of personalty used or maintained in connection with its hospital system as well as all its rights and interest in its buildings and lands (App. – 89, no. 2, *Assets*). Presumably, since the District's only purpose is to operate a hospital or hospital system, this would encompass all its assets, and no other similar assets of the District would be available for any other denominations or sects to use for their purposes, nor would any assets remain for use by the District or any neutral entity for a secular purpose.

Under the contemplated agreement, essentially all the District's assets will be used by one denomination only. Too, the same church will be empowered to determine services available at the District's hospital, and no other denominations or sects will have such a power.

**C. The decision below conflicts with prior decisions of this Court which hold that a political subdivision of a State cannot coerce nonadherents to a religious faith to abide by and to accept the theology and directives of that religious faith.**

Although Establishment Clause questions do not depend upon the coercive effect of a State's statute or act, the contemplated agreement between the District and Sisters of Charity is an example of the coercive power of government.

Petitioner, who does not subscribe to all of the teachings of the Roman Catholic Church, will be or has been forced to support "the healing ministry of Jesus Christ" in the context of the theology of the Roman Catholic Church with his taxes paid to the District. Others, whether they adhere to Roman Catholic religious beliefs or not, might be compelled to accept the services limited by the rules established by the National Conference of Catholic Bishops. Like the students required to attend schools by compulsory education laws in *Illinois v. Board of Education*, 333 U.S. 203 (1948) and *Engel v. Vitale*, 370 U.S. 421 (1962), indigents residing in the District, to whom the District must furnish medical services under the Texas Constitution, and emergency patients, whose well-being and lives often depend upon immediate medical attention, might have no choice but to accept health care promulgated by the Roman Catholic Church, or to do without medical services entirely. The District, by its contractual agreement that Sisters of Charity and the National Conference of Catholic Bishops will determine available services, commands that religious concerns of

Sisters of Charity automatically control over all secular interests of the District, its hospital's patients, and its taxpayers, which is forbidden. *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703 (1985).

**D. The decision below conflicts with prior decisions of this Court which hold that a political subdivision of a State cannot delegate its governmental authority to a church.**

The Sisters of Charity of the Incarnate Word, Houston, Texas and the entities of the SCH health care system "shall be managed and directed according to the doctrines, disciplines, laws, rules and regulations of the Roman Catholic Church, the constitutions, directives, resolutions and decrees of the Congregation, and the ethical and religious directives for Catholic health facilities as approved by the National Conference of Catholic Bishops." (App. – 98 at App. – 113). Under the letter of intent between the District and the Sisters of Charity, the agreement "will provide that SCH will not be required to provide services which violate SCH's Ethical Policies and the Religious and Ethical Directives for Catholic Health Facilities as promulgated by the National Conference of Catholic Bishops . . . " (App. – 88 at App. – 91, no. 3, *Lease Terms*).

Sisters of Charity's power to determine services provided at Jasper Hospital District facilities is not limited by any power retained by the Respondent District, and SCH's power, in respect to the District, is standardless

and calls for no reasons, findings, or reasoned conclusions for its exercise by SCH or by the Roman Catholic Church or its national conference of bishops.

Any lease by the District which contains such a provision limiting services, with no powers retained by the District to determine available services, would violate the Court's ruling in *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982) because the governmental power to determine services is vested in and delegated to an instrumentality of the Roman Catholic Church, the Sisters of Charity of the Incarnate Word (which in turn is to act in accord with directives promulgated by the National Conference of Catholic Bishops). The hospital district's discretionary authority over its hospital system is delegated to a group defined by its character and by its charter as religious (specifically, as one denomination), and the lease gives no assurance that the governmental power has been or will be exercised neutrally. *Board of Ed. of Kiryas Joel Village School District v. Grumet*, 512 U.S. 687 (1994).

**E. The decision below conflicts with prior decisions of this Court which hold that the purpose of a political subdivision's action must be a secular purpose, that a primary or principal effect of a political subdivision's action cannot be to aid, to advance, or to endorse one church or religion, and that a political subdivision cannot act so to become excessively entangled with a religion.**

The proposed contract between the Respondent hospital district and the Sisters of Charity of the Incarnate Word, Houston, Texas satisfies no element of the three-

part test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

(i) Secular Purpose:

The District's action must have a secular legislative purpose. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1970).

As found by the court below (App. – 1 at App. – 10), as admitted by Respondent District in its motion for summary judgment (App. – 120 at App. – 127), and, especially, as is evident from the face of the letter of intent (App. – 88), what was once a neutral hospital will be, or is now, a denominational hospital, and what were once secular medical services will become, or are now, a healing ministry conducted according to the theology and directives of the Roman Catholic Church and its national council of bishops.

The proper inquiry under the purpose prong of *Lemon* is "whether the government intends to convey a message of endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. 668 (1984) (O'CONNOR, J., concurring, at 690); *Wallace v. Jaffree*, 472 U.S. 38 (1985). The secular purpose requirement is not satisfied by the mere existence of some secular purpose dominated by religious purposes. *Lynch v. Donnelly*, 465 U.S., at 690-691 (O'CONNOR, J., concurring). In this case, then, the question is whether the District could intend anything other than an endorsement of Roman Catholicism when an express term of the letter of intent is that the eventual agreement will provide that the District cannot require the Sisters of Charity to furnish medical services which violate its ethical policies and the directives promulgated by the National Conference of Catholic Bishops. The

Court has recognized "that regardless of what 'legislative purpose' may mean in other contexts, for the purpose of the *Lemon* test it means the 'actual' motives of those responsible for the challenged actions". *Edwards v. Aguillard*, 482 U.S. 578 (1987) (SCALIA, J., dissenting, at 613). Here, though the District's ostensible purposes might be to contract for rents, for additional funds to pay its debts, and for management of its hospital system, the letter of intent clearly shows the District's intent to approve of, and to adopt as its own, the denominational medical services of Sisters of Charity. Too, from its articles of incorporation and from the letter, the motives of Sisters of Charity are undeniably religious.

(ii) Aid or Advance:

The principal or primary effect of District's action must be one that neither advances nor inhibits religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1970); *Board of Education v. Allen*, 392 U.S. 236, 243 (1968); *Walz v. Tax Commissioner*, 397 U.S. 664, 668 (1970).

As to whether a government practice does not cause advancement of religion as a primary effect, "[w]hat is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion. It is only practices that have that effect, whether intentionally or unintentionally, that make religion relevant, in reality or public perception, to status in the political community". *Lynch v. Donnelly*, 465 U.S. 668 (1984) (O'CONNOR, J., concurring, at 692). "Whether the key word is 'endorsement,' 'favoritism,' or 'promotion,' the essential principal remains the same. The Establishment Clause, at the very least, prohibits government

from appearing to take a position on questions of religious belief or from 'making adherence to a religion relevant in any way to a person's standing in the political community.' " *Allegheny County v. Greater Pittsburgh ACLU*, 492 U.S. 573 (1989).

Again, in the present case, the District intends to be or is bound by a contract under which its hospital will be operated by an instrumentality of one particular church, and that instrumentality will determine services available at the hospital based upon policies and directives promulgated by that church and its bishops. Because the District has agreed to so limit medical services available at its hospital, the message conveyed by the District is that it approves of Sisters of Charity's religious beliefs. District taxpayers, patients at its hospital, and other members of the public who share Sisters of Charity's religious convictions regarding medical services which should be made available and which should be withheld at the hospital will be satisfied with the services offered and satisfied that their religious concerns have been addressed by the District. Nonadherents to Sisters of Charity's policies and those who do not fully share its religion, however, might not be satisfied with the District and Sisters of Charity's limitations upon available services. The result will be conflicting groups divided by religious beliefs, one of which will perceive its adherent/members as favored insiders in the political community, and the other of which will perceive its nonadherent/members as political outsiders.

The finding of the court below and the District's admission that the hospital resulting from the contemplated agreement is or would be a denominational hospital suffice to show that a principal effect of the agreement is that Sisters of Charity's religion will be or has been advanced and endorsed. The lack of evidence that the agreement's effect would not be to advance the one denomination and the absence of proof that the District's choice of one denomination's policies concerning available services was proper due to a compelling District interest confirm the conclusion that the primary effect of the contract will be or is advancement.

Petitioner acknowledges that the record contains no evidence of the value of the District's assets, nor is there evidence of the fair rental value of the assets. It follows that there is neither concrete proof that an effect of the District's proposed agreement will be to aid (that is, to help fund) Sisters of Charity's religious mission, nor is there proof that the agreement will not aid in its ministry. (The agreement is apparently of some economic benefit to Sisters of Charity; otherwise, it would have constructed its own hospital and purchased its own assets). Nevertheless, the Respondent District should have met its burden of proof for the fiscal aid aspect of advancement in order for the court below to conclude that the primary effect of the lease would not be advancement of Sisters of Charity's healing ministry. TEX. R. CIV. P. 166a.

(iii) Excessive Entanglement.

The District's action must not foster an excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971); *Walz v. Tax Commission*, 397

U.S. 664 (1970). Here, the letter of intent provides for all District property to be used by Sisters of Charity. There is no doubt from the articles of incorporation of Sisters of Charity that it is a "pervasively sectarian" entity and that its purpose is a religious purpose. Though no District monitoring of Sisters of Charity's operations is provided for in the letter of intent, intensive District surveillance and continuous intrusion upon Sisters of Charity's operations at the hospital, that is, "excessive entanglement", will be necessary to insure that District's property is not used for a religious purpose. *Bowen v. Kendrick*, 487 U.S. 589, 615 (1988).

"The 'establishment of religion' . . . means at least this: . . . Government cannot, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa". *Everson v. Board of Education*, 330 U.S. 1 (1947). Although the letter of intent is silent as to the activities of the regional board of Sisters of Charity's Southeast Texas facilities, the District's representation on that board will be participation with other instrumentalities of the Roman Catholic Church. Further, Sisters of Charity's determining available services at the District's hospital will be or is participation by it in the affairs of the District.

## 2. THE FEDERAL QUESTION IS IMPORTANT.

### A. The decision below would allow every taxing authority to change its secular, governmental purpose to a sectarian purpose by the artifice of a "lease".

If the court below is correct in ruling that the contemplated lease and operating agreement is valid, by analogy

to the facts of the instant case, any taxing authority would be permitted to transfer all its property to a church under a lease and to contract with the church for the management of the property, even if the property will be used for a religious purpose. For example, a school district could lease its facilities to a church and agree that the church will operate the school in no manner inconsistent with the church's theology and directives, and the resulting parochial school would be permissible.

**B. A hospital's services are provided during times when and under circumstances in which patients at the hospital and their relations are most spiritually impressionable and most susceptible to religious indoctrination.**

## CONCLUSION

This petition for a writ of certiorari should be granted.

Respectfully submitted,

E. McAlister Benchoff
*Counsel of Record*

Benchoff & Benchoff
316 University Drive
P.O. Box 631063
Nacogdoches, Texas 75963
(409) 564-0278
*Counsel for Petitioner*

Steve Seale
132 East Lamar Street
Jasper, Texas 75951
(409) 384-8611
*Petitioner*

No. _____

In The

# Supreme Court of the United States

October Term, 1997

STEVE SEALE,

*Petitioner,*

v.

JASPER HOSPITAL DISTRICT,

*Respondent.*

On Petition For Writ Of Certiorari
To The Court Of Appeals For The
Ninth District Of Texas At Beaumont

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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In The

*Court of Appeals*

*Ninth District of Texas at Beaumont*

---

NO. 05-95-231 CV

---

STEVE SEALE, Appellant

V.

JASPER HOSPITAL DISTRICT AND JASPER MEMORIAL HOSPITAL FOUNDATION, INC., Appellees

---

On Appeal from the 1st District Court
Jasper County, Texas
Trial Cause No. 17484

(Filed Oct. 2, 1997)

---

OPINION

Our Opinion of August 14, 1997, is withdrawn and this Opinion is substituted. Appellants' motion for rehearing is denied.

Appellant, Steve Seale, sued appellees, Jasper Hospital District (District) and Jasper Memorial Hospital Foundation, Inc., (Foundation) seeking (1) a declaratory judgment that a proposed hospital lease (the "Lease") between appellees and Sisters of Charity of the Incarnate Word ("Sisters of Charity") is constitutionally void and illegal; (2) a permanent injunction enjoining appellees from entering into the Lease, and (3) recovery of attorney's fees. In addition, Seale filed a motion with the trial court to require appellees to show that the attorneys,

Orgain, Bell & Tucker, L.L.P., were authorized to represent appellees in this lawsuit.

Appellees answered and filed a Motion for Summary Judgment and a First Amended Motion for Summary Judgment on the grounds that: (1) Seale lacked standing to file and prosecute this lawsuit, (2) that no justiciable controversy existed between Seale and appellees, (3) that the proposed Lease did not involve any state action, (4) that the proposed Lease did not violate the Establishment Clause, and (5) that the appellees had legal authority to enter into the Lease. Seale filed his motion for summary judgment on the ground that as a matter of law the Lease would violate the Establishment Clause of the First Amendment to the United States Constitution and Article 1, section 6 and 7 of our Texas Constitution.

The trial court granted appellees' Motion for Summary Judgment and First Amended Motion for Summary Judgment and denied Seale's Motion for Summary Judgment. During the motion for new trial process, appellees alleged that the lawsuit had become moot because appellees and Sisters of Charity decided not to enter into the Lease. Seale's motion for new trial was overruled by operation of law, and his appeal followed.

The dispositive issues this appeal presents are whether (1) this lawsuit is moot and, additionally, can this Court consider the extraneous proof attached to appellants' Motion for Consideration of Extraneous Proof to resolve the mootness issue; (2) the trial court erred in denying appellant's Motion to Show Authority; (3) the

trial court properly granted appellees' Motion for Summary Judgment; and (4) the trial court properly denied appellant's Motion for Summary Judgment.

We grant both appellant's and appellees' unopposed motions to respectively supplement the transcript; grant appellant's motion for consideration of extraneous proof; and affirm the trail court's judgment: (1) denying Seale's motion to show authority, (2) granting the summary judgment in favor of appellees and (3) denying Seale's summary judgment.

## Mootness

Appellees first contend that this lawsuit is moot for the sole reason that appellees no longer intend to enter into the questioned lease and that this was brought to the attention of the trial court in reply to appellant's motion for new trial.

Appellees objected to appellant's motion [in this Court] for consideration of extraneous proof and contended that we are not authorized to consider such extraneous proof beyond matters that govern jurisdictional facts because such evidence was not before the trial court. The extraneous proof in question contains lease and sublease agreements between the parties for the subject property dated March 15, 1996, and an affidavit by Ted G. Walker, Secretary of Jasper Hospital District Board of Directors, attesting to the leases.

Mootness is a matter that ordinarily arises after the rendition of the judgment or order appealed from, and, consequently, the appellate court can only determine such

a question on consideration of evidence of matters subsequent to such order. For that purpose alone we may receive and consider extraneous proof. *Jackson v. Lubben*, 502 S.W.2d 860, 862 (Tex. Civ. App. – Dallas 1973, dism'd as moot). Appellees' objection to appellant's motion for consideration of extraneous proof is overruled.

Considering the lease between the parties and the subject property, we disagree with appellees that the issues in this lawsuit and appeal are moot. Appellees' first reply point is rejected.

## Motion to Show Authority

Appellant's fourth and fifth points of error contend that the trial court erred in not granting his motion for defendants' attorneys to show authority to represent defendants in this action because there is no evidence (1) that the "District" retained its attorneys in compliance with the Texas Open Meetings Act, and, consequently, the District's retention of such attorneys is void [point four]; and (2) that the "Foudation" retained its attorneys legally or otherwise.

The transcript received reflects that appellant filed his motion to show authority, on January 17, 1995, pursuant to Tex. R. Civ. P. 12, which provides:

> A party in a suit or proceeding pending in a court of this state may, by sworn written motion stating that he believes the suit or proceeding is being prosecuted or defended without authority, cause the attorney to be cited to appear before the court and show his authority to act. The notice of the motion shall be served upon the challenged attorney at least ten days before the

> hearing on the motion. At the hearing on the motion, the burden of proof shall be upon the challenged attorney to show sufficient authority to prosecute or defend the suit on behalf of the other party. Upon his failure to show such authority, the court shall refuse to permit the attorney to appear in the cause, and shall strike the pleadings if no person who is authorized to prosecute or defend appears. The motion may be heard and determined at any time before the parties have announced ready for trial, but the trial shall not be unnecessarily continued or delayed for the hearing.[1]

The [supplemental] transcript further reflects that appellees filed their response to the motion on February 9, 1995, containing an affidavit of Robert Hall, president of the Board of Directors of the "District" and the "Foundation" attesting that both the "District" and the "Foundation" had retained the attorneys in question to represent each in this lawsuit. A Rule 12 evidentiary hearing was held on February 9, 1995. Pursuant to the trail court's orders and instructions, appellees then filed with the trial court on February 13, 1995, notices and minutes of the Board of Directors' February 10, 1995 meetings for both the "District" and "Foundation" in which both parties' boards of directors in effect ratified

---

[1] We note that our transcript does not contain an order overruling appellants' motion to show authority. While it is mandatory in most cases and always the better practice in others to include orders in the transcript that are being attacked on appeal, we conclude that it is not fatal in this case because (1) by reply point appellees acknowledge that appellant's motion was denied by the trial court, TEX. R. APP. P. 74(f), and (2) the motion is a single grounds motion and we can resolve the issue presented without the order itself.

and reauthorized the questioned attorneys' authority to represent the appellees.

It is undisputed that the "Foundation" is a non-profit corporation and that the "District" is a political subdivision of the State of Texas, thus subject to the Texas Open Meetings Act. It is uncontested that appellees' February 10, 1995 meetings were in compliance with the Act.

Texas law provides that a Board of Directors may ratify any act or contract of a corporation which they could have ratified in the first place. *Bowers Steel, Inc. v. Debrooke*, 557 S.W.2d 369, 372 (Tex. Civ. App. – San Antonio 1977, no writ). Such ratification relates back to the time of the act ratified. *Great Plains Life Ins. Co. v. First Nat'l Bank of Lubbock*, 316 S.W.2d 98, 106 (Tex. Civ. App. – Amarillo 1958, writ ref'd n.r.e.). We find that the Hall affidavit and February 10, 1995 "Foundation" Board of Directors notice and minutes are sufficient evidence to defeat appellants' motion to show authority as to the "Foundation".

While Texas law further provides that ratification by a governmental entity subject to the Open Meetings Act does not have a retroactive effect, it is equally clear that the "District" can meet and again authorize actions which were previously authorized at an invalid meeting. *See City of Bells v. Texoma Util. Auth.*, 790 S.W.2d 6, 11 (Tex. App. – Dallas 1990, writ denied). We find that the Hall affidavit and February 10, 1995 "District" Board of Directors notice and minutes are sufficient evidence to defeat appellant's motion to show authority as to the "District".

In any event a Rule 12 hearing by its nature is an evidentiary hearing and our record does not confirm any statement of facts for such a hearing.

The burden is on the appellant to see that a sufficient record is presented to show error requiring reversal. TEX. R. APP. P. 50(d); *Christiansen v. Prezelski*, 782 S.W.2d 842, 843 (Tex. 1990); *Escontrias v. Apodaca*, 629 S.W.2d 697, 699 (Tex. 1982). In *Englander Co. v. Kennedy*, 428 S.W.2d 806 (Tex. 1968), our Supreme Court in addressing appellants' burden has stated:

> When the complaint is that the evidence is factually or legally insufficient to support vital findings of fact, or that the evidence conclusively refutes vital findings, this burden cannot be discharged in the absence of a complete or an agreed statement of facts.

*Id.* at 807.

When an appeal is taken without a statement of facts, all presumptions are in favor of the judgment and we must presume that there is evidence to support the court's judgment. *Mays v. Pierce*, 154 Tex. 487, 281 S.W.2d 79, 82 (1995); *Men's Wearhouse v. Helms*, 682 S.W.2d 429, 430 (Tex. App. – Houston [1st Dist.] 1984, writ ref'd n.r.e.), *cert. denied*, 474 U.S. 804, 106 S.Ct. 38, 88 L.Ed.2d 31 (1985).

Accordingly, in the absence of a statement of facts, we hold that appellant has failed in his burden to show evidentiary error regarding the Rule 12 matter.

For the reasons stated appellant's fourth and fifth points of error are overruled.

Constitutional Violation Issues

Appellant next contends that the trial court erred in granting appellees' summary judgment [second half of appellant's points of error one and two] and in denying appellant's summary judgment [point three] because the undisputed facts of this case demonstrate as a matter of law that the lease is not legally permissible or would violate the establishment clause of the first amendment to the United States Constitution and Article 1, sections 6 and 7 of the Texas Constitution.

We first note that appellant's brief does not address any state constitutional argument nor does it cite any authority. Such state constitutional argument is therefore waived. TEX. R. APP. P. 74(f); *McPherson Ent. v. Producers Co-op.*, 827 S.W.2d 94, 96 (Tex. App. – Austin 1992, writ denied). In any event, after diligent research we find no authorities to support appellant's state constitutional violation allegations contained in points of error one through three. Accordingly, points one through three are denied.

Appellant also challenges the lease with a Federal Constitutional argument under the establishment Clause of the First Amendment of the United States Constitution. This issue was decided adverse to appellant's position many years ago. In *Bradfield v. Roberts*, 175 U.S. 291, 298, 20 S.Ct. 121, 124, 44 L.Ed. 168, 175 (1899), the United States Supreme Court held that there was no violation of the Establishment Clause where Congress constructed a hospital building caring for poor patients, even though the hospital was managed by Sisters of the Roman Catholic Church.

A fixed principal in this field is the Supreme Court's consistent rejection of the argument that any program which in some manner aids an institution with a religious affiliation violates the Establishment Clause. *Mueller v. Allen*, 463 U.S. 388, 393, 103 S.Ct. 3062, 3066, 77 L.Ed.2d 721, 726-27 (1983) citing *Bradfield v. Roberts, supra*. It has long been established that the government may send a cleric, and indeed a clerical order to perform a wholly secular task. *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 746, 96 S.Ct. 2337, 2344, 49 L.Ed.2d 179, 187 (1976), citing *Bradfield v. Roberts, supra*. The government must take a neutral position and must confine itself to secular objectives. *Roemer*, 49 L.Ed.2d 188.

Appellant cites *Lemon v. Kurtzman*, 403 U.S. 602, 612, 91 S.Ct. 2105, 29 L.Ed.2d 745, 755 (1971), as authority pursuant to which the United States Supreme Court established a three prong test to determine whether government action violates the Establishment Clause. The *Lemons* [sic] test is (1) whether the conduct has a secular purpose, (2) whether the principal effect of the challenged activity is to advance or inhibit religion, and (3) whether the activity would create an excessive entanglement of religion. The proposed Lease satisfies the *Lemon* test. The Lease had a secular purpose of providing and maintaining hospital facilities within the Jasper Hospital District. The principal effect of the proposed Lease was not to advance the Roman Catholic religion but rather to provide for the maintenance of a hospital within the Jasper Hospital District. Nor did the proposed Lease create any "excessive" government entanglement with religion. The Lease was not going to entangle the District or the Hospital with the Roman Catholic Church, but rather

it was to be a legitimate business transaction to provide for the maintenance of a hospital in the District.

Denominational hospitals have a constitutional right to freedom of religion. This right allows those with religious or moral scruples to refuse to perform sterilizations and abortions. *Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308 (9th Cir. 1974). Essentially, appellant maintains that a denominational hospital must give up its rights of religion in order to lease the Jasper Memorial Hospital. Such a position is not neutral towards religion, but instead is hostile towards religion.

Appellant's constitutional argument contained in points of error one through three are denied and we need not address appellant's standing argument contained in points of error one and two.

The judgment is AFFIRMED.

/s/ Ron Carr
RON CARR[2]
Justice

Submitted on August 7, 1997
Opinion Delivered October 2, 1997
Do Not Publish

Before Burgess, Stover and Carr, JJ.

---

[2] The Honorable Ron Carr, sitting by assignment pursuant to TEX. GOV'T CODE ANN. § 74.003(b) (Vernon 1988).

NO. 17484

| | | |
|---|---|---|
| STEVE SEALE, ET AL | ) | IN THE DISTRICT |
| | ) | COURT OF |
| VS. | ) | |
| JASPER HOSPITAL | ) | |
| DISTRICT AND | ) | |
| JASPER MEMORIAL | ) | |
| HOSPITAL FOUNDATION, | ) | JASPER COUNTY, |
| INC. | ) | TEXAS |

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed Apr. 10, 1995)

BE IT REMEMBERED, on this date came on to be considered Defendants' Motion for Summary Judgment and Defendants' First Amended Motion for Summary Judgment; and the Court, after considering said Motions and the arguments presented by counsel, finds and concludes that Defendants' Motion for Summary Judgment and Defendants' First Amended Motion for Summary Judgment are meritorious and should be granted.

It is, therefore, ORDERED, ADJUDGED, and DECREED that Defendants' Motion for Summary Judgment and Defendants' First Amended Motion for Summary Judgment are hereby GRANTED.

SIGNED this 31st day of March, 1995.

/s/ James W. Mehaffy, Jr.
JUDGE PRESIDING

NO. 17484

| | | |
|---|---|---|
| STEVE SEALE, ET AL | ) | IN THE DISTRICT |
| VS. | ) | COURT OF |
| | ) | |
| JASPER HOSPITAL DISTRICT AND JASPER MEMORIAL HOSPITAL FOUNDATION, INC. | ) | JASPER COUNTY, TEXAS |

ORDER DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

(Filed Apr. 10, 1995)

BE IT REMEMBERED, on this date came on to be considered Plaintiffs' Motion for Summary Judgment; and the Court, after considering said Motion and the arguments presented by counsel, finds that said Motion should be denied.

It is, therefore, ORDERED, ADJUDGED, and DECREED that Plaintiffs' Motion for Summary Judgment is hereby DENIED.

SIGNED this 31st day of March, 1995.

/s/ James W. Mehaffy, Jr.
JUDGE PRESIDING

COURT OF APPEALS
NINTH DISTRICT OF THE STATE OF TEXAS
1001 Pearl, Suite 330
Beaumont, Texas 77701

Judgment entered October 2, 1997

Steve Seale

vs No. 09-95-231 CV

Jasper Hospital District, et al

Appealed from the 1st District Court of Jasper County

Opinion by Justice Ron Carr, sitting by assignment

This cause came on to be heard on the transcript of the record, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment; it is therefore considered, adjudged and ordered that the judgment of the Court below be in all things affirmed and that all costs of the appeal be assessed against the appellant, Steve Seale. A copy of this judgment shall be certified below for observance.

Carol Anne Flores,
Clerk

THE SUPREME COURT OF TEXAS

[SEAL]

Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

January 8, 1998

Mr. John Stephen Seale
132 East Lamar Street
Jasper, TX 75951

Mr. Lance Fox
Orgain Bell & Tucker
470 Orleans
Beaumont, TX 77701

Mr. David Jefferson Fisher
Orgain Bell & Tucker
470 Orleans Street
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Mr. E. McAlister Benchoff
Benchoff & Benchoff
P.O. Box 631063
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Mr. Robert M. Jackson
P.O. Box 2106
Jasper, TX 75951

Mr. John Creighton, III
Orgain Bell & Tucker
470 Orleans Street
Beaumont, TX 77701

RE: Case Number 97-1035

Style: STEVE SEALE v. JASPER HOSPITAL DISTRICT and JASPER MEMORIAL HOSPITAL FOUNDATION, INC.

Dear Counsel:

Today, the Supreme Court of Texas denied the petition for review in the above styled case.

Sincerely,

John T. Adams, Clerk

by /s/ Courtland Crocker
Courtland Crocker
Deputy

cc: Ms. Carol Anne Flores, Clerk
Ms. Nell Powers

THE SUPREME COURT OF TEXAS

[SEAL]

Post Office Box 12248
Austin, Texas 78711 (512) 463-1312

---

February 26, 1998

Mr. John Stephen Seale
132 East Lamar Street
Jasper, TX 75951

Mr. Lance Fox
Orgain Bell & Tucker
470 Orleans
Beaumont, TX 77701

RE: Case Number 97-1035
Court of Appeals Number: 09-95-00231-CV
Trial Court Number: 17484

Style: STEVE SEALE
v.
JASPER HOSPITAL DISTRICT and JASPER MEMORIAL HOSPITAL FOUNDATION, INC.

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above styled petition for review.

Sincerely,

John T. Adams, Clerk

by /s/ Michael H. Kopp
Michael H. Kopp, Deputy

cc: Ms. Carol Anne Flores, Clerk
Ms. Nell Powers

---

## CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

U. S. CONST. amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U. S. CONST. amend. XIV:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

## RULE 14(g)(i) STATEMENT

The stage in the proceedings, both in the court of first instance and in the appellate courts, when the federal questions sought to be reviewed were raised, the method or manner of raising them, and the way in which they were passed on by those courts, and pertinent quotations of specific portions of the record or summary thereof, with reference to the places in the record where the matter appears are set forth below:

## PLAINTIFFS' ORIGINAL PETITION

In the Plaintiffs' Original Petition filed by Petitioner on December 16, 1994 in Cause No. 17,484 on the Docket of the District Court of Jasper County, Texas, the cause entitled "Steve Seale, et al vs. Jasper Hospital District and Jasper Memorial Hospital Foundation, Inc." (Transcript, Pages 2-4, inclusive), Petitioner, as plaintiff, alleged the following:

* * *

Plaintiffs would show unto the Court that any lease agreement (whether actual or contemplated) between Defendants and the Sisters of Charity of the Incarnate Word, Houston, Texas, would be void, as violating the Establishment Clause of the United States Constitution * * * .

* * *

> . . . "The Lease Agreement will provide that SCH will not be required to provide services which violate SCH's Ethical Policies and the Religious and Ethical Directives for Catholic

> Health Facilities as promulgated by the National Conference of Catholic Bishops, subject to provision for existing family planning services consistent with such Directives." . . .

Any lease agreement as contemplated or to be contemplated between Defendants and the Sisters of Charity of the Incarnate Word, Houston, Texas, would involve an excessive, government entanglement with religion.

* * *

Plaintiffs request and pray that:

* * *

2. The Court make a declaratory judgment that any lease agreement between Defendants and Sisters of Charity of the Incarnate Word, Houston, Texas, is or would be void as involving an excessive, government entanglement with religion; and the Court issue a permanent injunction enjoining Defendants from entering into or executing any lease agreement with the Sisters of Charity of the Incarnate Word, Houston, Texas.

* * *

PLAINTIFFS' FIRST AMENDED ORIGINAL PETITION

In the Plaintiffs' First Amended Original Petition filed by Petitioner on January 25, 1995 in Cause No. 17,484 on the docket of the District Court of Jasper County, Texas, the cause entitled "Steve Seale, et al vs. Jasper Hospital District and Jasper Memorial Hospital Foundation, Inc. (Transcript, Pages 53-56, inclusive), Petitioner's trial pleading, Petitioner, as plaintiff, alleged the following:

* * *

I.

Plaintiffs are Steve Seale and other taxpayers of the Jasper Hospital District. Plaintiff Seale does not subscribe to all of the theology, philosophy and other teachings and norms of the Roman Catholic Church. Defendants have appeared and answered herein.

II.

That on or about November, 1994, Defendants entered into a Letter of Intent with the Sisters of Charity of the Incarnate Word-Houston, Texas, with an effective date of November 28, 1994 * * * .

* * *

III.

Plaintiffs would show unto the Court that any lease agreement (whether actual or contemplated) between Defendants and the Sisters of Charity of the Incarnate Word, Houston, Texas, would be void, as violating the Establishment Clause of the United States Constitution and would be void as violating Vernons Ann. Tex. Constitution Art. 1, §6 and §7. This is because Defendant is a government entity allowed by statute, approved by the voters of the district, with the power to tax the voters. Sisters of Charity of the Incarnate Word, Houston, Texas, is a Non-Profit corporation. Its corporate purpose as stated in Article IV of its Amended and Restated Articles of Incorporation dated July 28, 1994, is:

> "The purposes for which the Corporation is organized exclusively are religious, charitable

> and educational. They shall be conducted and accomplished in context of the theology, philosophy and other teachings and norms of the Roman Catholic Church. The Corporation is formed to carry on Jesus Christ's healing ministry by providing health care to all persons and supporting the handicapped and elderly, without regard to the beneficiaries' ability to pay, to the extent of, and within the limits of the Corporation's resources, through the operation of health care and associated activities, programs, networks, facilities and institutions." . . .

In item number 3 of the above-referenced Letter of Intent entitled Lease Terms, it states:

> . . . "The Lease Agreement will provide that SCH will not be required to provide services which violate SCH's Ethical Policies and the Religious and Ethical Directives for Catholic Health Facilities as promulgated by the National Conference of Catholic Bishops, subject to provision for existing family planning services consistent with such Directives." . . .

Any lease agreement as contemplated or to be contemplated between Defendants and the Sisters of Charity of the Incarnate Word, Houston, Texas, would involve an excessive, government entanglement with religion.

* * *

Plaintiffs request and pray that:

* * *

2. The Court make a declaratory judgment that any lease agreement between Defendants and Sisters of Charity of the Incarnate Word, Houston, Texas, is or would be

void as involving an excessive, government entanglement with religion; and the Court issue a permanent injunction enjoining Defendants from entering into or executing any lease agreement with the Sisters of Charity of the Incarnate Word, Houston, Texas.

* * *

PLAINTIFFS' 1ST SUPPLEMENTAL PETITION

In the Plaintiffs' 1st Supplemental Petition (which supplemented plaintiffs' first amended original petition) filed by Petitioner on January 25, 1995 in Cause No. 17,484 on the docket of the District Court of Jasper County, Texas, the cause entitled "Steve Seale, et al vs. Jasper Hospital District and Jasper Memorial Hospital Foundation, Inc." (Transcript, Pages 139-140, inclusive), Petitioner, as plaintiff, alleged the following:

* * *

Plaintiffs, Steve Seale and other taxpayers supplement their petition by the addition of the following:

" V.

"Plaintiffs' tax monies are being extracted and spent in violation of specific constitutional protections including those found in the 1st Amendment of the United States Constitution and Article 1, Sections 6 and 7 of the Texas Constitution against such abuses of the legislative power, being such power to tax and spend as exercised by the Board of Directors of Defendant Jasper Hospital District.

" VI.

It is unlawful for Defendants to lease facilities which in effect are all of Defendants' assets and which were obtained by substantial expenditures of tax dollars. This lease would violate the Establishment Clause of the 1st Amendment to the United States Constitution. There is a nexus between Plaintiffs and the challenged activity of Defendants."

* * *

PLAINTIFF'S MOTION FOR
PARTIAL SUMMARY JUDGMENT

In Plaintiff's Motion for Partial Summary Judgment and Response and Objections to Defendants' Motion for Summary Judgment filed by Petitioner on February 28, 1995 in Cause No. 17,484 on the docket of the District Court of Jasper County, Texas, the cause entitled "Steve Seale, et al vs. Jasper Hospital District and Jasper Memorial Hospital Foundation, Inc." (Transcript, Pages 145-182, inclusive), Petitioner urged violation of U. S. CONST. amend. I, Establishment Clause as the bases for denial of Defendants' motion for summary judgment and for grant of Petitioner's motion for partial summary judgment. Plaintiff's (Petitioner's) Motion for Partial Summary Judgment and Response and Objections to Defendants' Motion for Summary Judgment is fully set forth in this appendix at App. – 72.

On March 31, 1995, in Cause No. 17,484, "Steve Seale et al vs. Jasper Hospital District and Jasper Memorial Hospital Foundation, Inc.", the District Court of Jasper

County, Texas granted the Defendants' Motion for Summary Judgment and denied Petitioner's Motion for Partial Summary Judgment (Transcript, Page 183, Transcript, Page 184, respectively; App. – 11, App. – 12, respectively).

## MOTION FOR NEW TRIAL

In Petitioner's Motion for New Trial filed on April 28, 1995, in Cause No. 17,484 on the docket of the District Court of Jasper County, Texas, Petitioner moved the trial court to grant a new trial (Transcript, Pages 188 – 189), and the motion for new trial was overruled by operation of law.

## APPELLANT'S BRIEF

In Petitioner's Appellant's Brief which was filed on August 22, 1995, in Cause No. 09-95-00231-CV on the docket of the Court of Appeals for the Ninth District of Texas, at Beaumont, Texas, the cause entitled "Steve Seale, Appellant, vs. Jasper Hospital District and Jasper Memorial Hospital Foundation, Inc., Appellees", the appeal of Cause No. 17,484 in the District Court of Jasper County, Texas, Petitioner, as appellant, urged the following points of error as grounds for reversal of the trial court:

* * *

### POINT OF ERROR 1

The trial court erred in granting defendants' motion for summary judgment because there is no summary

judgment evidence which proves that plaintiff lacks standing to maintain this action or which proves that the proposed lease-operating agreement is or would be legally permissible under the Establishment Clause of the First Amendment to the United States Constitution and Article 1, Section 6 and Section 7 of the Texas Constitution.

POINT OF ERROR 2

The trial court erred in granting defendants' motion for summary judgment because the plaintiff's uncontroverted summary judgment evidence establishes that he has standing to bring this action and that the lease-operating agreement between defendant Jasper Hospital District and the Sisters of Charity of the Incarnate Word, Houston, Texas would violate the Establishment Clause of the First Amendment to the United States Constitution and Article 1, Section 6 and Section 7 of the Texas Constitution.

POINT OF ERROR 3

The trial court erred in denying plaintiff's motion for summary judgment because the plaintiff's summary judgment evidence establishes as a matter of law that the lease-operating agreement between defendant Jasper Hospital District and the Sisters of Charity of the Incarnate Word, Houston, Texas would violate the Establishment Clause of the First Amendment to the United States Constitution and Article 1, Section 6 and Section 7 of the Constitution of the State of Texas.

* * *

(Appellant's Brief, Cause No. 09-95-00231-CV, Court of Appeals for the Ninth District of Texas at Beaumont, Texas).

On August 14, 1997, in Cause No. 09-95-00231-CV, the Court of Appeals for the Ninth District of Texas affirmed the orders of the District Court of Jasper County, Texas; the August 14, 1997 Court of Appeals judgment and opinion were withdrawn, and its October 2, 1997 judgment and October 2, 1997 opinion were substituted for the August 14, 1997 judgment and opinion. (October 2, 1997 Judgment and October 2, 1997 Opinion of the Court of Appeals for the Ninth District of Texas at Beaumont, Texas, Cause No. 09-95-00231-CV; App. – 13 and App. – 1, respectively).

APPELLANT'S MOTION FOR REHEARING

In Petitioner's Motion for Rehearing filed on August 27, 1997, in Cause No. 09-95-00231-CV on the docket of the Court of Appeals for the Ninth District of Texas, Petitioner, as appellant, urged the following points of error and grounds for rehearing:

* * *

POINT OF ERROR 1

The court of appeals erred in overruling plaintiff/appellant's point of error 1 and in failing to reverse the trial court's summary judgment in favor of defendants because there is no summary judgment evidence supporting defendants' motion for summary judgment and

defendants' amended motion for summary judgment which proves that plaintiff lacks standing to maintain this action or which proves that the proposed lease-operating agreement is or would be legally permissible under the Establishment Clause of the First Amendment to the United States Constitution * * * .

POINT OF ERROR 2

The court of appeals erred in overruling plaintiff/appellant's point of error 2, in failing to reverse the trial court's summary judgment in favor of defendants, and in failing to render judgment in favor of plaintiff/appellant because the plaintiff's uncontroverted summary judgment evidence establishes that he has standing to bring this action and that the lease-operating agreement between defendant Jasper Hospital District and the Sisters of Charity of the Incarnate Word, Houston, Texas would violate the Establishment Clause of the First Amendment to the United States Constitution * * * .

POINT OF ERROR 3

The court of appeals erred in overruling plaintiff/appellant's point of error 3 and in failing to render judgment in favor of plaintiff/appellant because the plaintiff's summary judgment evidence establishes as a matter of law that the lease-operating agreement between defendant Jasper Hospital District and the Sisters of Charity of the Incarnate Word, Houston, Texas would violate the Establishment Clause of the First Amendment to the United States Constitution * * * .

* * *

(Appellant's Motion for Rehearing, Cause No. 09-95-00231-CV, Court of Appeals for the Ninth District of Texas at Beaumont, Texas).

On October 2, 1997, in Cause No. 09-95-00231-CV, the Court of Appeals for the Ninth District of Texas affirmed the trial court's orders and withdrew its August 14, 1997 judgment and opinion. (October 2, 1997 Judgment and October 2, 1997 Opinion of the Court of Appeals for the Ninth District of Texas at Beaumont, Texas, Cause No. 09-95-00231-CV; App. – 13 and App. – 1, respectively).

## PETITION FOR REVIEW

In Petitioner's Petition for Review filed on November 6, 1997, in Cause No. 97-1035 on the docket of the Supreme Court of Texas, the cause entitled "Steve Seale vs. Jasper Hospital District and Jasper Memorial Hospital Foundation, Inc.", the appeal of Cause No. 09-95-00231-CV in the Court of Appeals for the Ninth District of Texas, Petitioner urged the following issues as grounds for reversal of the trial court and the court of appeals:

* * *

### ISSUE 1

The court of appeals erred in failing to reverse the trial court's summary judgment in favor of defendants because there is no summary judgment evidence supporting defendants' motion for summary judgment and defendants' amended motion for summary judgment which proves that plaintiff lacks standing to maintain this

action or which proves that the proposed lease-operating agreement is or would be legally permissible under the Establishment Clause of the First Amendment to the United States Constitution * * * .

ISSUE 2

The court of appeals erred in failing to reverse the trial court's summary judgment in favor of defendants and in failing to render judgment in favor of plaintiff because the plaintiff's uncontroverted summary judgment evidence establishes that he has standing to bring this action and that the lease-operating agreement between defendant Jasper Hospital District and the Sisters of Charity of the Incarnate Word, Houston, Texas would violate the Establishment Clause of the First Amendment to the United States Constitution * * * .

ISSUE 3

The court of appeals erred in failing to render judgment in favor of plaintiff because the plaintiff's summary judgment evidence establishes as a matter of law that the lease-operating agreement between defendant Jasper Hospital District and the Sisters of Charity of the Incarnate Word, Houston, Texas would violate the Establishment Clause of the First Amendment to the United States Constitution * * * .

* * *

(Petition for Review, Cause No. 97-1035, Supreme Court of Texas)

On January 8, 1998, the Supreme Court of Texas, in Cause No. 97-1035, denied Petitioner's petition for review (January 8, 1998 letter order of the Supreme Court of Texas, Cause No. 97-1035; App. – 14).

## MOTION FOR REHEARING PETITION FOR REVIEW

In Petitioner's Motion for Rehearing of the Denial of Petition for Review filed on January 26, 1998, in Cause No. 97-1035 on the docket of the Supreme Court of Texas, the appeal of Cause No. 09-95-00231-CV in the Court of Appeals for the Ninth District of Texas, Petitioner urged the following issues as grounds for rehearing of Petitioner's petition for review and reversal of the trial court and the court of appeals:

* * *

### ISSUE 1

The Supreme Court erred in denying the petition for review and in failing to reverse the trial court's summary judgment in favor of defendants because there is no summary judgment evidence supporting defendants' motion for summary judgment and defendants' amended motion for summary judgment which proves that plaintiff lacks standing to maintain this action or which proves that the proposed lease-operating agreement is or would be legally permissible under the Establishment Clause of the First Amendment to the United States Constitution * * * .

ISSUE 2

The Supreme Court erred in denying the petition for review, in failing to reverse the trial court's summary judgment in favor of defendants, and in failing to render judgment in favor of plaintiff because the plaintiff's uncontroverted summary judgment evidence establishes that he has standing to bring this action and that the lease-operating agreement between defendant Jasper Hospital District and the Sisters of Charity of the Incarnate Word, Houston, Texas would violate the Establishment Clause of the First Amendment to the United States Constitution * * * .

ISSUE 3

The Supreme Court erred in denying the petition for review and in failing to render judgment in favor of plaintiff because the plaintiff's summary judgment evidence establishes as a matter of law that the lease-operating agreement between defendant Jasper Hospital District and the Sisters of Charity of the Incarnate Word, Houston, Texas would violate the Establishment Clause of the First Amendment to the United States Constitution * * * .

* * *

(Motion for Rehearing of the Denial of Petition for Review, Cause No. 97-1035, Supreme Court of Texas)

On February 26, 1998, the Supreme Court of Texas, in Cause No. 97-1035, overruled Petitioner's motion for rehearing of the denial of petition for review (February 26, 1998 letter order of the Supreme Court of Texas, Cause No. 97-1035; App. – 15).

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NO. 17484

| | | |
|---|---|---|
| STEVE SEALE | § | IN THE |
| VS. | § | DISTRICT COURT |
| | § | |
| JASPER HOSPITAL DISTRICT AND JASPER MEMORIAL HOSPITAL FOUNDATION, INC. | § | OF |
| | § | |
| | § | JASPER COUNTY, |
| | § | TEXAS |

**DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

(Filed Feb. 3, 1995)

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW, Jasper Hospital District and Jasper Memorial Hospital Foundation, Inc., the Defendants in the above styled and numbered cause of action, and file this their Motion for Summary Judgment, and in support thereof show unto the Court the following:

## I. NATURE OF CASE

Plaintiff, Steve Seale, filed this suit seeking (1) a declaratory judgment that a proposed lease (the "Lease") between Defendants and Sisters of Charity of the Incarnate Word ("Sisters of Charity") is void and illegal and (2) a permanent injunction enjoining Defendants from entering into the Lease.

Defendants deny that the Lease is illegal and void and Defendants assert that Plaintiff lacks standing to pursue this suit. In the alternative, Defendants seek a declaratory judgment that the Lease is valid and legal.

## II. BACKGROUND FACTS

The subject matter of this suit centers around the Lease to be entered into between Defendants and Sisters of Charity. Under the terms of the Lease, Sisters of Charity will lease and operate Defendant's hospital and related facilities.

Defendant, Jasper Memorial Hospital District (the "District"), was created in 1963 by the Texas Legislature pursuant to Article IX Section 9 of the Texas Constitution and pursuant to H.B. No. 377, Chapter 56, 58th Leg., p. 96, amended by S.B. 473, 58th Leg., p. 196, ch. 109. A true and correct copy of the legislative act creating the District is attached as Exhibit 1 to the Affidavit of Robert Hall which has been attached hereto as Exhibit A and is incorporated herein by reference.

The District owns and operates the Jasper Memorial Hospital and related facilities (the "Hospital") located in Jasper, Jasper County, Texas. *See* Affidavit of Robert Hall attached hereto as Exhibit A.

Defendant, Jasper Memorial Hospital Foundation, Inc. (the "Foundation"), is a private foundation organized to benefit the Hospital by providing funds for facilities and equipment for the Hospital. *See* Affidavit of Robert Hall attached hereto as Exhibit A.

The District and Sisters of Charity have entered into a letter of intent signed November 28, 1994, but effective as of November 22, 1994 (the "Letter of Intent"), pursuant to which Sisters of Charity make a definitive offer to

enter into the Lease. The proposed closing date for consummating the Lease is February 28, 1995. *See* Affidavit of Robert Hall attached hereto as Exhibit A.

Under the terms of the Letter of Intent and the Lease, the District will lease the Hospital to Sisters of Charity for a term of 10 years. Sisters of Charity will also have an option to renew for the lease term for an additional 10 years. Sisters of Charity will pay rent to the District in accordance with the terms of the Lease and the amount of the rent during the initial 10 year lease term was determined based on the Hospital's earnings. It is estimated that the base rent will be $250,000.00 for the initial 10 year term. In addition, Sisters of Charity will pay more than $905,000.00 of the Hospital's outstanding indebtedness as of the date the lease term commences. *See* Affidavit of Robert Hall attached hereto as Exhibit A.

## III. GROUNDS FOR SUMMARY JUDGMENT AND DISMISSAL

As a matter of law, Plaintiff lacks standing to file and prosecute this suit. Plaintiff has no interest in the Lease and no justiciable controversy exists between Plaintiff and Defendants.

Alternatively, if the Court finds that Plaintiff has standing, then, as a matter of law, the Court should find that Defendants have legal authority to enter into the Lease with Sisters of Charity and Defendants' Motion for Summary should be granted.

## IV. DISCUSSION AND ANALYSIS

### A. Standing.

It is a fundamental principle of law that "[i]n order for any person to maintain a suit it is necessary that he have standing to litigate the matters in issue." *Hunt v. Bass*, 664 S.W.2d 323, 324 (Tex. 1984). "Standing consists of some interest peculiar to the person individually and not as a member of the general public." *Id.* Absent a statutory exception to the contrary, this general rule of standing is applied in all cases. *Id. See also Scott v. Board of Adjustment*, 405 S.W.2d 55 (Tex. 1966).

When a declaratory judgment is sought, standing exists only if there is a real controversy between the parties which will be actually determined by the judicial declaration sought. *Texas Association of Business v. Texas Air Control Board*, 852 S.W.2d 440 (Tex. 1993).

Plaintiff's only allegation for having an interest in the Lease and the subject matter of this lawsuit is that he is a taxpayer of the Jasper Hospital District. This is not sufficient to establish standing. There are many Texas cases that have held that a taxpayer does not have standing to maintain an action which involves the authority of a governmental entity to engage in a particular transaction.

For example, in a case similar to the one before this Court, *Galveston County Beach Park Board v. Johnson*, 822 S.W.2d 828 (Tex. App. – Houston [1st Dist.] 1992), writ denied 848 S.W.2d 689 (Tex. 1993), the plaintiff sued the Galveston County Beach Park Board and Galveston County seeking a declaratory judgment that a proposed sale and lease of property by the Board and County

would violate the Texas Government Code. In this action, the plaintiff sought a permanent injunction to enjoin the Board and County from entering into the lease transaction. The plaintiff filed the suit in his capacity as a county commissioner and as a taxpayer. The appellate court held that the plaintiff did not have standing to bring the suit because he did not establish an interest peculiar to him alone. It was not sufficient that the plaintiff was a taxpayer and member of the general public.

Similarly, in *Schulman v. City of Houston*, 406 S.W.2d 219 (Tex. Civ. App. – Tyler 1966, writ ref'd n.r.e.), the plaintiffs were taxpayers who filed suit to enjoin the City of Houston and a sanitation company from constructing and operating a garbage plant. The plaintiffs alleged that the defendants were engaged in the performance of an illegal and void contract and that the City of Houston was unlawfully expending public funds and donating public lands. The court held that the plaintiffs lacked standing to pursue the action. It was not sufficient that the plaintiffs were taxpayers residing in the City of Houston. Rather, the court held that the plaintiffs must show that they will sustain some special damage. It made no difference that the contract might be unauthorized and illegal.

In another case, *Altgelt v. City of San Antonio*, 17 S.W. 75 (Tex. 1890), the taxpayer sued to set aside a contract between the City of San Antonio and a waterworks company. In the action, the taxpayer sought to restrain the City from paying out any municipal funds under the contract. The court found that the contract was illegal, but held that the plaintiff did not have standing to maintain the suit. The fact that the plaintiff was a taxpayer

residing in the City was not sufficient to establish standing.

In *Wood v. City of Victoria*, 46 S.W. 284 (Tex. Civ. App. 1898, writ ref'd), a taxpayer sought an injunction to restrain the City of Victoria from supplying water to a private corporation under a water supply contract. The taxpayer alleged that the contract was illegal. Although the court found that the contract was illegal, it denied the taxpayer's request for the injunction because he could not establish standing to maintain the suit.

Likewise, in *Dallas Electric Company v. City of Dallas*, 58 S.W. 153 (Tex. Civ. App. 1900, writ ref'd), the plaintiffs were taxpayers residing in the City of Dallas who sued to enjoin the City from making further payments to the Dallas Electric Company under a contract that the plaintiffs alleged was illegal. The Court held that the plaintiffs lacked standing to maintain the suit and held that only the City had standing to pursue such an action.

In another case, *Houston Natural Gas Corp. v. Wyatt*, 359 S.W.2d 257 (Tex. Civ. App. – Houston 1962, no writ), the court held that the plaintiffs, as taxpayers of the City of Corpus Christi, did not have standing to enjoin the City from entering into a contract alleged to be void. The taxpayers alleged that the contract was void because the City had failed to take public bids for the contract. *See also West Texas Utilities Co. v. Smith*, 168 S.W.2d 665 (Tex. Civ. App. – Austin 1943, writ ref'd) (city taxpayer did not have standing to enjoin execution of a city contract); *Estes v. City of Grandbury*, 314 S.W.2d 154 (Tex. Civ. App. – Fort

Worth 1958, writ ref'd) (city taxpayer did not have standing to enjoin the issuance of utility bonds without showing any injury peculiar to himself); *Hobb v. Waesthoff*, 102 S.W.2d 293 (Tex. Civ. App. – Galveston 1936, writ ref'd) (city taxpayer did not have standing to enjoin issuance of bonds illegally authorized, notwithstanding a statute to the contrary purporting to grant standing); *San Antonio Conservation Society v. City of San Antonio*, 250 S.W.2d 259 (Tex. Civ. App. – Austin 1952, writ ref'd) (taxpayers had no justiciable controversy to maintain suit to enjoin the construction of a bridge within the city).

Texas courts have also held that a taxpayer lacks standing to challenge the activities of a city or other governmental agency under a contract where there are no tax funds involved in the challenged activities. For example, in *Alexander v. City of Greenville*, 585 S.W.2d 333 (Tex. Civ. App. – Dallas 1979, writ ref'd n.r.e.), the court held that the plaintiff taxpayer lacked standing to challenge an electric contract entered into by the City of Greenville because no tax funds were involved in the challenged activities and the plaintiff did not show some peculiar interest in the contract. Likewise, in *Franks v. Welch*, 389 S.W.2d 142 (Tex. Civ. App. – Houston 1965, writ ref'd n.r.e.), the court held that the plaintiff taxpayers had no standing to challenge the city's performance of a contract for the construction of a dam and reservoir project because no tax funds were involved in the transaction.

Under Texas law, an exception may exist to grant a taxpayer standing to sue if standing is granted by statute, such as in election contests. *See Marshall v. City of Lubbock*, 520 S.W.2d 553 (Tex. Civ. App. – Amarillo 1975, writ ref'd n.r.e.); *Hardy v. Hannah*, 849 S.W.2d 355 (Tex. App. Austin

1992, writ denied). However, in this case Plaintiff has not shown that any such statutory exception exists.

The only statute cited by Plaintiff in his Petition is Section 286.129 of the Texas Health & Safety Code. Plaintiff argues that the Lease violates Section 286.129 because it will require the District to incur a debt payable from revenues for a period in excess of two years. This allegation by Plaintiff is incorrect and Section 286.129 of the Texas Health & Safety Code is not applicable to the Lease. Under the terms of the Lease, the District is not incurring or creating any debt, but rather it will receive rental income from the Sisters of Charity. Furthermore, even if Section 286.129 was remotely applicable to the Lease, the Texas Health & Safety Code does not grant standing to Plaintiff to challenge the validity of the Lease.

B. Authority to Enter into the Lease.

In the alternative, if the Court finds that Plaintiff has standing to pursue this action, Defendants move for summary judgment on the grounds that as a matter of law, the proposed Lease between Defendants and Sisters of Charity is a valid and legal transaction and Defendants have legal authority to enter into such transaction. Such authority has been recognized by Texas courts and by the Attorney General of the State of Texas.

Section 3 of the Act creating the District specifically provides that the District's board of directors has "full management and control of all business of the District, including but not limited to the power and authority to negotiate and contract with any person or body, public or

private, to purchase or lease land, to construct and equipment a hospital system, to operate and maintain the hospital and to negotiate and contract with other political subdivisions of the State of Texas or private individuals, associations or corporations for such purpose." Accordingly, the Act contemplates and specifically authorizes the District to enter into the Lease with Sisters of Charity as part of the District's authority to negotiate and contract with others to maintain a hospital. Furthermore, Section 286.077(b)(3) of the Texas Health and Safety Code specifically provides that the board of directors of a hospital district has the authority to lease its hospital facilities to physicians, individuals, companies, corporations and other legal entities.

In a case similar to the one before this Court, the El Paso Court of Civil Appeals upheld a trial's [sic] court denial of an injunction that was sought by the appellant to enjoin Andrews County from leasing hospital facilities. *See Sullivan v. Andrews County*, 517 S.W.2d 410 (Tex. Civ. App. – El Paso 1974, writ ref'd n.r.e.). Specifically, the appellant was a taxpayer residing in the county who sought for himself and other resident taxpayers an injunction to enjoin Andrews County from purchasing a private office building and leasing the building back to a group of doctors. The court found that the county had statutory authority to lease all or part of its medical facilities. The court also found that the lease did not violate the Texas Constitution because the county was receiving substantial value in return for the lease. Although this case involved a county and not a hospital district, the arguments and issues presented to the court were substantially the same as those raised in this case.

In addition, the Attorney General of the State of Texas has addressed this issue on several occasions and has consistently ruled that a hospital district has the authority to lease its facilities to a private organization if the transaction is found to be in the best interest of the District's residents and if it serves a hospital purpose.

For example, in Opinion No. DM-131 (June 29, 1992), the Texas Attorney General's Office held that the Chambers County Hospital District could lease part of its facility to a group of private physicians to operate an adolescent drug treatment center. The Attorney General's Office cited Section 286.077(b) of the Texas Health and Safety Code, which empowers a board of directors of a hospital district to transfer district facilities by a lease. However, the Attorney General's Office pointed out that in determining whether the Hospital District had power to enter into the lease transaction, it must also consider whether the transaction is in accord with Article IX Section 9 of the Texas Constitution. This provision requires that the transaction be for hospital purposes. The Attorney General's Office concluded that the drug treatment center would serve a hospital purpose. Finally, the Attorney General's Office held that it must also consider whether or not the proposed transaction complied with the requirements of Article III Section 52 of the Texas Constitution. This provision requires that the transaction be done for a valid public purpose and that the district must receive substantial value in return for the lease. The Attorney General's Office ruled that so long as the Board finds that the lease serves a public purpose and the Board requires adequate consideration, then this condition would be satisfied and the lease would be valid.

Similarly, in Opinion No. DM-66 (December 11, 1991), the Texas Attorney General's Office held that the Val Verde Hospital District could construct a building to lease to private physicians to operate a dialysis center provided that (1) the District's board of directors determined that the terms and conditions of the lease are in the best interests of the inhabitants of the District and (2) that the lease will serve a hospital purpose.

Likewise, in Opinion No. JM-864 (February 23, 1988), the Texas Attorney General's Office held that the Amarillo Hospital District had authority to lease the District's hospital upon finding that the lease is in the best interest of the district's residents. In its opinion, the Attorney General noted that a hospital district has the duty under the Indigent Health Care and Treatment Act to provide health care services to indigents and that it may do so by providing health care services through public facilities or by contracting with a private provider or through the purchase of insurance.

Also, in Opinion No. H-966 (March 30, 1977), the Texas Attorney General's Office ruled that the Denton City-County Hospital Board had authority to lease land to private persons for construction of a medical office building. The lease was found to be authorized since the lease was to accomplish a public purpose and the lessee was to pay the Board adequate consideration for the use of the property.

Accordingly, in light of the above authorities, it is clear that Defendants have authority to enter into the Lease with Sisters of Charity. All of the conditions and requirements established in the rulings of the Texas

Attorney General's Office have been or will be met. Specifically, (1) the Lease serves a hospital purpose, (2) the Lease serves a valid public purpose since it will enable the District to continue to provide a hospital facility to the residents of the District, and (3) prior to execution of the Lease in definitive form, the Board of Directors of the District will determine that the terms and conditions of the Lease will be in the best interests of the residents of the District and that Sisters of Charity will pay the District substantial value and consideration for the Lease.

## V. CONCLUSION

As a matter of law, Plaintiff lacks standing to pursue this action because he has no special interest in the Lease and no justiciable controversy exists between Plaintiff and Defendants. Thus, summary judgment should be entered in favor of Defendants and Plaintiff's suit should be dismissed.

Alternatively, even if Plaintiff has standing, as a matter of law, the Court should find that Defendants have legal authority to enter into the Lease with Sisters of Charity.

WHEREFORE, PREMISES CONSIDERED, Defendants pray and request that the Court grant Defendants' Motion for Summary Judgment, that Defendants recover their costs and attorney's fees incurred in this proceeding and that Defendants have such other and further relief, legal or equitable, general or special, that Defendants may show themselves justly entitled to receive.

Respectfully submitted,

ORGAIN, BELL & TUCKER, L.L.P.
470 Orleans
Beaumont, Texas 77701
(409) 838-6412 – Telephone
(409) 838-6959 – Fax

By: /s/ David J. Fisher
David J. Fisher
State Bar No. 07049525

By: /s/ Lance Fox
Lance Fox
State Bar No. 07334850

ATTORNEYS FOR DEFENDANTS

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Defendants' Motion for Summary Judgment has been served on Steve Seale, 132 East Lamar, Jasper, Texas 75951, pro se and attorney of record for Plaintiff, by certified mail, return receipt requested, on this 2nd day of February, 1995.

/s/ Lance Fox
Lance Fox

[First Attachment to Defendants' Motion for Summary Judgment]

NO. 17484

| | | |
|---|---|---|
| STEVE SEALE | § | IN THE |
| VS. | § | DISTRICT COURT |
| | § | |
| JASPER HOSPITAL DISTRICT AND JASPER MEMORIAL HOSPITAL FOUNDATION, INC. | § | OF |
| | § | |
| | § | JASPER COUNTY, |
| | § | TEXAS |

**AFFIDAVIT OF ROBERT HALL**

| | |
|---|---|
| THE STATE OF TEXAS | § |
| | § |
| COUNTY OF JASPER | § |

BEFORE ME, the undersigned authority, on this date personally appeared Robert Hall, known to me to be the person whose name is subscribed below and hereinafter being first duly sworn, deposed and stated under oath the following:

1. My name is Robert Hall. I am of sound mind, over the age of 18 years and fully capable and competent to testify to the matters stated herein and have personal knowledge of all of the facts and statements made herein.

2. I am President of the Board of Directors of the Jasper Hospital District (the "District") and Jasper Memorial Hospital Foundation, Inc. (the "Foundation").

3. The District was created in 1963 by the Texas Legislature pursuant to Article IX, Section 9 of the Texas Constitution and pursuant to H.B. No. 377, Chapter 56, 58th Legislature, page 96, amended by S.B. 473, 58th Legislature, page 196, Chapter 109. A true and correct

copy of the legislative act creating the District is attached hereto as Exhibit 1 and is incorporated herein by reference.

4. The District owns and operates the Jasper Memorial Hospital and related facilities (the "Hospital") located in Jasper, Jasper County, Texas.

5. The Foundation is a private foundation organized to benefit the Hospital by providing funds for facilities and equipment for the Hospital.

6. The District has entered into a letter of intent signed November 28, 1994, but effective as of November 22, 1994 (the "Letter of Intent") with Sisters of Charity of the Incarnate Word ("Sisters of Charity") pursuant to which Sisters of Charity make a definitive offer to the District to lease the Hospital. The proposed closing date for consummating the lease is February 28, 1995.

7. Under the terms of the Letter of Intent and the proposed lease, the District will lease the Hospital to Sisters of Charity for a term of 10 years. Sisters of Charity will have an option to renew the lease for a term of an additional 10 years. Sisters of Charity will pay rent to the District in accordance with the terms of the lease and the amount of the rent during the initial 10 year lease term was determined based on the Hospital's earnings. It is estimated that the base rent will be $250,000.00 for the initial 10 year term. In addition, Sisters of Charity will pay more than $905,000.00 of the Hospital's outstanding indebtedness as of the date the lease term commences.

8. None of the District's tax revenues are committed or pledged to pay Sisters of Charity under or pursuant to

the Letter of Intent or the proposed lease for any purpose whatsoever, including payment or reimbursement for furnishing indigent care.

/s/ Robert Hall
Robert Hall

SWORN TO AND SUBSCRIBED BEFORE ME this 31st day of January, 1995.

(Seal) ALENE DUNN
NOTARY PUBLIC
State of Texas
Comm. Exp. 12-07-96

/s/ Alene Dunn
Notary Public,
State of Texas

[First Attachment to Hall's Affidavit]

JASPER HOSPITAL DISTRICT

CHAPTER 56[61]

H. B. No. 377

An Act relating to the creation, administration and financing of a hospital district whose boundaries are coterminous with the boundaries of county commissioners precincts numbered one and two of Jasper County; providing for severability; and declaring an emergency.

*Be it enacted by the Legislature of the State of Texas:*

Section 1. Pursuant to the provisions of this Act and Section 9 of Article IX, Constitution of the State of Texas, there may be created a hospital district, the boundaries of which district shall be coterminous with the boundaries describing commissioners precinct number one and commissioners precinct number two of Jasper County. The hospital district shall be known as the Jasper Hospital District, and shall hereinafter be referred to as "District." The District shall have the power to issue bonds for the purpose of purchasing a site for and the construction and initial equipping of a hospital system, and the operation and maintenance thereof, or for purchasing, leasing, or acquiring, equipping, maintaining, and operating a hospital system, and further the power to levy a tax of not to exceed seventy-five cents (75¢) on the One Hundred Dollar property valuation therein for the purpose of paying the principal and interest on such bonds and for maintaining and operating a hospital or hospital system.

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[61] Vernon's Ann.Civ.St.art. 4494q-9.

Sec. 2. (a) Upon the petitions of twenty-five (25) resident qualified taxpaying voters of commissioners precinct number one and commissioners precinct number two, a total of fifty (50) qualified taxpaying voters of the proposed District, the Commissioners Court of Jasper County shall order an election to be held within the proposed District to approve the creation of the District and to elect the first board of directors thereof. The Commissioners Court shall order such election within ten (10) days of the receipt of petitions and the election shall be held within said precincts within thirty (30) days after it is ordered.

(b) Upon and after the ordering of the election aforesaid, any resident of the District twenty-one (21) years of age or over and who owns land in the District subject to taxation, and is otherwise qualified, may file application with the Commissioners Court of Jasper County, Texas, to have his or her name placed on the ballot for election to the board of directors of said District. Such applications shall be received by said Court up to ten (10) days preceding the date of the election.

(c) At the election there shall be submitted to the resident qualified property taxpaying voters within the boundaries of the precincts who have duly rendered their property for taxation upon the tax rolls of said precincts, the proposition of whether or not the District shall be created within said boundaries; and a majority of the resident qualified property taxpaying voters voting at said election who have duly rendered their property for taxation upon the roles of said precincts voting in favor of the proposition shall be necessary to create the District.

The ballots shall have printed thereon:

"FOR the creation of a Hospital District and the levy of a tax not to exceed seventy-five cents (75¢) on the One Hundred Dollar valuation."

"AGAINST the creation of a Hospital District and the levy of a tax not to exceed seventy-five cents (75¢) on the One Hundred Dollar valuation."

There shall also be submitted to the resident qualified property taxpaying voters at such election a separate ballot containing the names of all of the qualified persons who shall file applications to have their names placed on the ballot for election to the board of directors. Each voter shall vote for nine (9) persons. The nine (9) persons receiving the highest number of votes shall constitute the first board of directors of said District. The three (3) receiving the highest number of votes shall serve for terms of six (6) years, the three (3) receiving the next highest number of votes shall serve for terms of four (4) years, and the three (3) receiving the next highest number of votes shall serve for terms of two (2) years.

Notice of such election stating the time of election, and the polling place and proposition and matters to be voted on shall be posted in a newspaper in general circulation in Jasper County, Texas, once a week for two (2) consecutive weeks, the first notice not being more than twenty (20) days prior to the date of election.

(d) The results of said election shall be filed in the county clerk's office of Jasper County, Texas, within ten (10) days thereafter. And if the majority of the resident property taxpaying voters voting at said election who

have duly rendered their property for taxation upon the tax rolls of said District vote for the creation of the District, then within ten (10) days of the filing of said results the Commissioners Court shall order the District created and shall at such time declare those persons elected as directors to be the board of directors of the District and such board of directors shall manage and operate the business of the District and shall serve as directors until their respective successors are elected and qualified.

Sec. 3. The board of directors of the District shall elect a president and secretary from the members to serve until the next succeeding directors' election; the board of directors shall have the full management and control of all business of the District, including but not limited to the power and authority to negotiate and contract with any person or body, public or private, to purchase or lease land, to construct and equip a hospital system, and to operate and maintain the hospital, and to negotiate and contract with other political subdivisions of the State or private individuals, associations or corporations for such purposes.

Sec. 4. (a) After creation of the District and the qualification of the board of directors, the board shall order an election to be held within the District at a time not less than twenty (20) days nor more than thirty (30) days from the date of the order for such election at which time the qualified resident property taxpaying voters who have duly rendered their property for taxation upon the tax rolls of the precincts composing the District shall vote to

determine if bonds of the District shall be sold to purchase, construct, acquire, repair, or renovate improvements and initially equip same for a hospital system and to operate and maintain same or to pay for the construction of the hospital system or the initial equipping of the hospital system and to operate and maintain same and to authorize the levy of a tax of not to exceed seventy-five cents (75¢) on the One Hundred Dollar valuation of property therein for the purpose of paying the principal and interest on such bonds and for maintaining and operating the system. At such election the proposition to be voted on shall set forth the purpose of the bonds, the amount of bonds to be issued and the voters shall vote for the issuance of bonds for said purpose and levy of taxes in payment thereof, or against the issuance of bonds for said purpose and levy of taxes in payment thereof.

(b) Notice of such election, stating the time of the election, the polling place, the amount of bonds as determined by the board to be necessary to be issued, the proposition to be voted on and the estimated cost shall be published in a newspaper of general circulation in Jasper County, Texas, once a week for two (2) consecutive weeks, the first notice not being more than twenty (20) days prior to the date of election.

(c) The board of directors shall name the polling places in the District and shall appoint two (2) judges, one of whom shall be presiding judge, and two (2) clerks for each voting place designated by them. The board of directors shall provide the necessary ballots for said election, which shall be printed.

(d) Immediately after the election the presiding judges shall make return of the result in the same manner as provided for in general elections for State and county officials. The return shall be made to the board of directors who shall at a regular or special session canvass said vote, and if a majority of the votes favor the issuance of bonds and levy of taxes, the board of directors shall so declare and enter the results in their minutes.

(e) After declaring the result of said election, the board of directors shall make and enter an order in their minutes directing the issuance of bonds for the District sufficient in amount to pay for the proposed project with all necessary, actual and incidental expenses connected therewith not to exceed the amount specified in the order and voted at the election. All bonds issued by the District shall be signed and executed by the president of the board and the secretary.

(f) Before such bonds are offered for sale, there shall be forwarded to the Attorney General a certified copy of all proceedings had in the organization of the District, and with reference to issuance of the bonds in connection with the bonds themselves, and such other information respecting same as he may require. The Attorney General shall carefully examine the bonds in connection with the record and Constitution and laws of the State governing the issuance of such bonds; and if the examination shows that such bonds are issued in conformity thereto, and that they are valid and binding obligations upon the District, he shall so officially certify.

(g) When the bonds are approved, they shall be registered by the Comptroller in a book kept for that

purpose and the certificate of the Attorney General as to their validity shall be preserved of record; whereupon such bonds shall be held prima facie valid in every action, suit or proceeding in which their validity may be brought into question. In every suit to enforce collection of such bonds and interest thereon, the only available defense against the validity of such bonds shall be forgery or fraud.

Sec. 5. (a) After the bonds have been registered, the directors shall sell same on the best terms and for the best price possible, not less than their face value and accrued interest; and shall promptly pay over to the District depository the proceeds of such sale to be placed to the credit of the District.

(b) At the time of the payment of interest or for redemption of District bonds, the depository shall receive and cancel any interest coupons so paid or any bonds so discharged and when such interest coupon or bond shall be turned over to the board of directors the account of such depository shall be credited with the amount thereof, and such bond or coupon shall be canceled and destroyed.

(c) When bonds have been issued, the board of directors shall procure and deliver to the county treasurer a well-bound book in which a list shall be kept of all bonds with their manner of payment, amount, rate of interest, date of issuance, when due, where payable, amount received for same, and the tax levy to pay interest on and redeem such bonds; and such books shall at all times be open to the inspection of the parties interested, either as taxpayers or bond holders. Upon the payment of

any bond, the treasurer shall make an entry thereof in said book; and he shall receive for such services the same fees allowed by law to the county clerk for recording deeds.

(d) The District when it has issued bonds, may, by consent of the holders thereof, refund any bonds heretofore issued by issuing new coupon bonds for that purpose. Refunding bonds shall not bear a greater rate of interest than the bonds in lieu of which they are issued. Interest shall be evidenced by coupons attached to the bonds, and may be payable annually or semi-annually, within the discretion of its board of directors; refunding bonds shall be payable serially, or otherwise, not exceeding forty (40) years from the date thereof, and shall be issued in denomination of One Hundred Dollars ($100), or some multiple thereof; and a sufficient tax levy to meet the payment of the principal and interest of said refunding bonds shall be made before the delivery thereof, providing the refunding of any bonds shall not affect any taxes already due.

The refunding bonds hereby authorized shall be issued in the manner provided by law for the issuance of refunding bonds by counties and cities. Any sum to the credit of any sinking fund account on hand shall first be deducted in ascertaining the amount of refunding bonds to be issued, and such money shall in every case be applied to the payment of the outstanding bonds. No refunding bonds shall be issued and delivered until approved by the Attorney General, and registered by the State Comptroller; provided, however, that the Comptroller shall not register such refunding bonds until the old bonds in lieu of which such refunding bonds are issued

are presented to him for cancellation; and after the registration of the new bonds the Comptroller shall cancel the old bonds and interest coupons and deliver such new bonds to the proper party or parties; provided, further, that the old bonds may be presented for cancellation, in installments, and a like amount of the new bonds registered and delivered as is herein provided.

Sec. 6. (a) Contracts for the making and construction of all improvements contemplated in this Act, and all necessary work in connection therewith, when the cost price exceeds Ten Thousand Dollars ($10,000) shall be let to the lowest responsible bidder, furnishing satisfactory evidence of possessing equipment and facilities essential to the proper performance of such contract; after giving notice by advertising the same in one (1) or more newspapers of general circulation in this State, once a week for four (4) weeks, and by posting a notice for at least ten (10) days at the courthouse door. Such contract shall be in writing and signed by the contractors and directors, and a copy so executed filed with the depository subject to inspection of all interested parties.

(b) The person, firm, corporation or association to which such contract is let shall give surety bond to the District in accordance with the provisions of Article 5160, Revised Civil Statutes of 1925, and amendments thereto.

(c) All contracts shall be fulfilled in accordance with the specifications and under the supervision of the board of directors and district agents.

Sec. 7. If said bonds and levying of taxes are approved by the voters, all expenses incident to calling

and holding all elections shall be paid out of any District funds except interest and sinking funds for bonds.

Sec. 8. The District shall have the right and power of eminent domain for the purpose of acquiring by condemnation any and all property of any kind or character, real, personal or mixed or any interest therein, including outright ownership of such property in fee simple absolute, within the boundaries of the District necessary or convenient to the exercise of the rights, powers, privileges and functions conferred upon it by this Act, in the manner provided by General Law with respect to condemnation; provided, that the District shall not be required to make deposits in the registry of the trial court of the sum required by Paragraph No. 2 in Article 3268, Vernon's Civil Statutes of the State of Texas, 1925, or to make the bond required therein. In condemnation proceedings being prosecuted by the District, the District shall not be required to pay in advance or to give bond or other security for costs in trial court nor to give any bond otherwise required for the issuance of a temporary restraining order or temporary injunction relating to a condemnation proceeding, nor to give bond for costs or for supersedeas bond on any appeal or writ of error proceeding to any Court of Civil Appeals or the Supreme Court.

Sec. 9. Within thirty (30) days after the election of the board of directors of the District created under this Act, the board shall select a depository for the District in the manner provided by law for the selection of county depositories; and such depository shall be the depository of such District for a period of two (2) years thereafter until its successor is selected and qualified.

Sec. 10. The district established or maintained under provisions of this Act shall be subject to inspection by any duly authorized representative of the State Board of Health or any State Board of Charities (or Public Welfare) that may hereafter be created, and of the Commissioners Court of the County, and resident officers shall admit such representatives into all District facilities and give them access on demand to all records, reports, books, papers, and accounts pertaining to the District.

Sec. 11. The board of directors may on behalf of the District accept donations, gifts, and endowments for the District, to be held in trust by the board of directors for such purposes and under such directions, limitations, and provisions as may be prescribed in writing by the donor, not inconsistent with proper management and objects of the District.

Sec. 12. To be eligible to vote in any election to be held by this District to issue bonds or levy taxes a person must be a qualified voter under the General Election Laws of this State and a resident property taxpayer in the District who has duly rendered his property for taxation upon the tax rolls of the precincts composing the District. Every person who offers to vote in any election held under the provisions of this Act shall take the following oath before the presiding judge of the polling place where he offers to vote, and such judge is authorized to administer same:

"I do solemnly swear that I am a qualified voter of Jasper County and that I am a resident property taxpayer of the District who has duly rendered my property for

taxation upon the tax rolls of either county commissioners precinct number one or two of Jasper County, Texas."

Sec. 13. (a) No person shall be appointed or elected as a member of the board of directors of the District unless he is a resident thereof and owns land subject to taxation therein and unless at the time of such election he shall be more than twenty-one (21) years of age.

(b) There shall be held a general election in the District on the first Saturday in April, 1965, and thereafter on the first Saturday in April of each odd numbered year at which three (3) directors shall be elected to serve for terms of six (6) years.

(c) All vacancies in the office of director and other offices shall be filled by appointment by the board of directors for the unexpired term. In the event the number of directors shall be reduced to less than six (6) then the remaining director or directors shall call a special election to fill said vacancies, and if they shall fail to do so within fifteen (15) days after such vacancies occur the County Judge of Jasper County, Texas, upon petition of any voter or creditor thereof shall order the holding of such election, fixing the date thereof, and order the publication of notice thereof by any county sheriff and name the officers to hold such election. In any such election held by order of the county judge the returns of an election shall be made to and filed in the office of the clerk of the court and he shall declare the result thereof. The officers elected shall furnish bond and qualify in the manner provided herein with reference to directors first appointed for said District upon its organization.

(d) The board of directors shall organize following each election of directors by electing one of their number as president and one of their number as secretary. Any five (5) members of the board of directors shall constitute a quorum and a concurrence of five (5) shall be sufficient in all matters pertaining to the business of the District.

(e) The board of directors shall meet at least monthly and shall hold such special meetings as they deem necessary and any taxpayer or resident or interested party may attend such meetings, but shall not participate in same without consent of the board of directors and may present in an orderly manner to said board of directors such matters as they desire.

(f) The board of directors shall keep a true account of all their meetings and proceedings and shall preserve all contracts, records of notices, duplicate vouchers, duplicate receipts and all accounts and records of whatever kind in a safe place and shall be delivered to their successors in office.

(g) All vouchers for the payment of any funds of the District shall be signed by at least two (2) members of the board of directors.

(h) The board of directors shall have kept a complete book of accounts for the District, and shall on June 1st of each year select a competent auditor who shall examine the accounts, books and reports of the depository, the assessor and collector and board of directors, and make full report thereon, a copy of which shall be filed with the depository, and a copy with the board of directors, and one with the county clerk. Such reports

shall state for what purposes the money from each fund has been expended.

(i) The board of directors shall employ all necessary employees for the proper handling and operation of the District and especially may employ a general manager, or administrator, attorney, bookkeeper and architect.

(j) The board of directors may purchase all necessary supplies, materials and office equipment to meet the needs of the District.

(k) Before entering upon his duties each member of the board of directors shall take and subscribe an oath faithfully to discharge the duties of his office without favor or partiality. The oath of the members of the board of directors originally elected shall be filed with the county clerk of Jasper County, Texas. All members of the board of directors subsequently elected shall, prior to entering upon their duties, file said oath with the secretary of the District.

(l) Each member of the board of directors shall give a good and sufficient bond for One Thousand Dollars ($1,000) payable to the District conditioned upon the faithful performance of his duties.

(m) Members of the board of directors may be removed from office in the same manner and for the same causes as the laws of the State of Texas provide for the removal of county officials.

(n) The members of the board of directors shall serve without compensation but shall be reimbursed for actual expenses incurred in the performance of their duties hereunder.

Sec. 14. (a) The District when created shall be a governmental agency, body politic and corporate and through its board of directors, sue and be sued in any and all courts of this State in the name of such District and all courts of the State shall take judicial notice of the establishment of the District and said District shall contract and be contracted with in the name of such District.

(b) The District shall have full right and authority to contract for the purchase of land, for the hospital system, the construction of said hospital and the initial equipping of the hospital system and shall have such powers of government and with authority to exercise such rights, privileges and functions concerning the purposes for which it was created, as may be conferred by this Act or any other law in this State to the benefit of which it may be entitled. No enumeration of specific powers herein shall be held a limitation upon the general powers conferred by the Act, unless distinctly so expressed.

Sec. 15. (a) The County of Jasper by its county tax assessor and collector shall assess and collect all taxes of the District in the manner in which it assesses and collects the taxes of Jasper County and turn over said taxes to the Jasper County Treasurer who shall deposit same to the credit of the District at its designated depository.

(b) The county tax assessor and collector shall receive one per cent (1%) of the total taxes shown on the completed roll for assessing such taxes and 1% (1%) for collecting same; provided, however, that the compensation for the collection of delinquent taxes shall be five percent (5%) of the amount collected.

(c) All taxes which have not been paid on the last day of January shall become delinquent on the first day of February each year and same shall be and remain a lien upon the property for which same were assessed although the owner be unknown or same be listed in the name of a person not the actual owner thereof or though the ownership be changed. All such property may be sold under a judgment of a court for all taxes, interest, penalty and costs assessed against same at any time after such taxes become delinquent. The District shall have authority to file suits for the collection of taxes against any and all property assessed for taxes and if the owner be unknown such suit may be filed against an unknown owner and the property sold under the judgment of the court. Taxes are not barred by any law of limitation and no law providing for a period of limitation as to debts or actions shall apply to such taxes.

Sec. 16. In the event there is ever created a District for the County of Jasper or a hospital district created for the balance of the County not including the boundaries of this District, then the board of directors of this District may, at its discretion, determine to merge with said county-wide hospital district or the district concerning the balance of the County; provided, (1) that the District would assume all outstanding indebtedness of this District; and (2) that the merger of districts be approved by the majority of the resident qualified property taxpaying voters voting at an election who have duly rendered their property for taxation upon the rolls of the precincts composing this District. Notice of such election would be given in the same manner as herein provided for the

calling of elections for the election of the members of the board of directors.

Sec. 17. If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Sec. 18. The immediate need for hospital facilities to care for the people within the boundaries of the District created by this Act and the crowded condition of the Calendars in both houses create an emergency and an imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended and said Rule is hereby suspended.

Passed the House, March 21 1963: Yeas 143, Nays 0; passed the Senate, March 27, 1963: Yeas 29, Nays 0.

Approved April 12, 1963.

Effective April 12, 1963.

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[Second Attachment to Hall's Affidavit]

JASPER HOSPITAL DISTRICT – DIRECTORS

CHAPTER 109

S. B. No. 473

An Act to amend House Bill No. 377, heretofore enacted by the 58th Legislature at its Regular Session in 1963, to clarify the qualification of voters at the election of directors for the District; to provide for the terms of office of the members

of the Board of Directors of said District; validating all proceedings heretofore had under House Bill No. 377; providing for severability; and declaring an emergency.

*Be it enacted by the Legislature of the State of Texas:*

Section 1. That Section 2 of House Bill No. 377, heretofore enacted by the 58th Legislature at its Regular Session in 1963,[11] be, and the same is hereby amended so as to read hereafter as follows:

"Sec. 2. (a) Upon the petitions of twenty-five (25) resident qualified taxpaying voters of commissioners precinct number one and commissioners precinct number two, a total of fifty (50) qualified taxpaying voters of the proposed District, the Commissioners Court of Jasper County shall order an election to be held within the proposed District to approve the creation of the District and to elect the first board of directors thereof. The Commissioners Court shall order such election within ten (10) days of the receipt of petitions and the election shall be held within said precincts within thirty (30) days after it is ordered.

"(b) Upon and after ordering of the election aforesaid, any resident of the District twenty-one (21) years of age or over and who owns land in the District subject to taxation, and is otherwise qualified, may file application with the Commissioners Court of Jasper County, Texas, to have his or her name placed on the

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[11] Vernon's Ann.Civ.St. art. 4494q – 9, § 2.

ballot for election to the board of directors of said District. Such applications shall be received by said court up to ten (10) days preceding the date of the election.

"(c) At the election there shall be submitted to the resident qualified property taxpaying voters within the boundaries of the precincts who have duly rendered their property for taxation upon the tax rolls of said precincts, the proposition of whether or not the District shall be created within said boundaries; and a majority of the resident qualified property taxpaying voters voting at said election who have duly rendered their property for taxation upon the rolls of said precincts voting in favor of the proposition shall be necessary to create the District.

"The ballots shall have printed thereon:

"FOR the creation of a Hospital District and the levy of a tax not to exceed seventy-five cents (75¢) on the One Hundred Dollar valuation."

"AGAINST the creation of a Hospital District and the levy of a tax not to exceed seventy-five cents (75¢) on the One Hundred Dollar valuation."

"There shall also be submitted to the resident qualified voters at such election a separate ballot containing the names of all of the qualified persons who shall file applications to have their names placed on the ballot for election to the board of directors. Each voter shall vote for nine (9) persons. The nine (9) persons receiving the highest number of voters shall constitute the first board of directors of said District. The five (5) receiving the highest number of votes shall serve for terms of two (2)

years, and the four (4) receiving the next highest number of votes shall serve for terms of one (1) year.

"Notice of such election stating the time of election, and the polling place and proposition and matters to be voted on shall be published in a newspaper of general circulation in Jasper County, Texas, once a week for two (2) consecutive weeks, the first notice not being more than twenty (20) days prior to the date of election.

"(d) The results of said election shall be filed in the county clerk's office of Jasper County, Texas, within ten (10) days thereafter. And if the majority of the resident property taxpaying voters voting at said election who have duly rendered their property for taxation upon the tax rolls of said District vote for the creation of the District, then within ten (10) days of the filing of said results the Commissioners Court shall order the District created and shall at such time declare those persons elected as directors to be the board of directors of the District and such board of directors shall manage and operate the business of the District and shall serve as directors until their respective successors are elected and qualified."

Sec. 2. That Section 12 of said House Bill No. 377, heretofore enacted by the 58th Legislature at its Regular Session in 1963,[12] be, and the same is hereby amended so as to read hereafter as follows:

"Sec. 12. To be eligible to vote in any election to be held by this District to issue bonds or levy taxes a person

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[12] Vernon's Ann.Civ.St. art. 4494q – 9, § 12.

must be a resident property taxpayer in the District who has duly rendered his property for taxation upon the tax rolls of the precincts composing the District. Every person who offers to vote in any such election held under the provisions of this Act shall take the following oath before the presiding judge of the polling place where he offers to vote, and such judge is authorized to administer same:

"I do solemnly swear that I am a qualified voter of Jasper County and that I am a resident property taxpayer of the District who has duly rendered my property for taxation upon the tax rolls of either county commissioners precinct number one or two of Jasper County, Texas."

Sec. 3. That Section 13 of said House Bill No. 377, heretofore enacted by the 58th Legislature at its Regular Session in 1963,[13] be, and the same is hereby amended so as to read hereafter as follows:

"Sec. 13. (a) No person shall be appointed or elected as a member of the board of directors of the District unless he is a resident thereof and owns land subject to taxation therein and unless at the time of such election he shall be more than twenty-one (21) years of age.

"(b) There shall be held a general election in the District on the first Saturday in April, 1964, at which four (4) directors shall be elected for terms of two (2) years, and a general election shall be held on the first Saturday in April, 1965, at which election five (5) directors shall be elected for terms of two (2) years, and thereafter four (4)

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[13] Vernon's Ann.Civ.St. art. 4494q – 9, § 13.

directors shall be elected in each even-numbered year and five (5) directors in each odd-numbered year.

"(c) All vacancies in the office of director and other offices shall be filled by appointment by the board of directors for the unexpired term. In the event the number of directors shall be reduced to less than six (6) then the remaining director or directors shall call a special election to fill said vacancies, and if they shall fail to do so within fifteen (15) days after such vacancies occur the County Judge of Jasper County, Texas, upon petition of any voter or creditor thereof shall order the holding of such election, fixing the date thereof, and order the publication of notice thereof by any county sheriff and name the officers to hold such election. In any such election held by order of the county judge the returns of an election shall be made to and filed in the office of the clerk of the court and he shall declare the result thereof. The officers elected shall furnish bond and qualify in the manner provided herein with reference to directors first appointed for said District upon its organization.

"(d) The board of directors shall organize following each election of directors by electing one of their number as president and one of their number as secretary. Any five (5) members of the board of directors shall constitute a quorum and a concurrence of five (5) shall be sufficient in all matters pertaining to the business of the District.

"(e) The board of directors shall meet at least monthly and shall hold such special meetings as they deem necessary and any taxpayer or resident or interested party may attend such meetings, but shall not participate in same without consent of the board of directors

and may present in an orderly manner to said board of directors such matters as they desire.

"(f) The board of directors shall keep a true account of all their meetings and proceedings and shall preserve all contracts, records of notices, duplicate vouchers, duplicate receipts and all accounts and records of whatever kind in a safe place and shall be delivered to their successors in office.

"(g) All vouchers for the payment of any funds of the District shall be signed by at least two (2) members of the board of directors.

"(h) The board of directors shall have kept a complete book of accounts for the District, and shall on June 1st of each year select a competent auditor who shall examine the accounts, books and reports of the depository, the assessor and collector and board of directors, and make full report thereon, a copy of which shall be filed with the depository, and a copy with the board of directors, and one with the county clerk. Such reports shall state for what purposes the money from each fund has been expended.

"(i) The board of directors shall employ all necessary employees for the proper handling and operation of the District and especially may employ a general manager, or administrator, attorney, bookkeeper and architect.

"(j) The board of directors may purchase all necessary supplies, materials and office equipment to meet the needs of the District.

"(k) Before entering upon his duties each member of the board of directors shall take and subscribe an oath faithfully to discharge the duties of his office without favor or partiality. The oath of the members of the board of directors originally elect shall be filed with the county clerk of Jasper County, Texas. All members of the board of directors subsequently elected shall, prior to entering upon their duties, file said oath with the secretary of the District.

"(l) Each member of the board of directors shall give a good and sufficient bond for One Thousand Dollars ($1,000) payable to the District conditioned upon the faithful performance of his duties.

"(m) Members of the board of directors may be removed from office in the same manner and for the same causes as the laws of the State of Texas provide for the removal of county officials.

"(n) The members of the board of directors shall serve without compensation but shall be reimbursed for actual expenses incurred in the performance of their duties hereunder."

Sec. 4. All proceedings heretofore had and taken under the provisions of the original House Bill No. 377 as heretofore enacted by the 58th Legislature at its Regular Session in 1963, by the Commissioners Court of Jasper County, petitioners for any election called thereunder, the notices of election, the conduct of any election and everything pertaining thereto, are hereby in all things ratified, validated and confirmed.

Sec. 5. If any provision of this Act or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of the Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared severable.

Sec. 6. The immediate need for hospital facilities to care for the people within the boundaries of the District created by this Act and the crowded condition of the calendars in both Houses create an emergency and imperative public necessity that the Constitutional Rule requiring bills to be read on three several days in each House be suspended, and said Rule is hereby suspended; and that this Act shall take effect and be in force from and after its passage, and it is so enacted.

Passed the Senate, April 23, 1963: Yeas 31, Nays 0; passed the House, April 30, 1963: Yeas 147, Nays 0.

Approved May 1, 1963.

Effective May 1, 1963.

No. 17,484

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| STEVE SEALE, ET AL | § | IN THE DISTRICT |
| VS. | § | COURT |
| | § | |
| JASPER HOSPITAL | § | OF |
| DISTRICT, ET AL | § | JASPER COUNTY, TEXAS |

MOTION FOR PARTIAL SUMMARY JUDGMENT AND RESPONSE AND OBJECTIONS TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

(Filed Febr. 28, 1995)

TO THE HONORABLE JUDGE OF SAID COURT:

Steve Seale, plaintiff, moves for partial summary judgment against the defendants, Jasper Hospital District and Jasper Hospital Foundation, Inc., and responds and objects to defendants' motion for summary judgment as follows:

1.

Nature of Plaintiff's Actions

Jasper Hospital District is a political subdivision of the State of Texas, established in 1963 by the Texas Legislature pursuant to Article IX Section 9 of the Texas Constitution and pursuant to H.B. No. 377, Chapter 56, 58th Leg., p. 96, amended by S.B. 473, 58th Leg., p. 196, ch. 109.

Jasper Hospital Foundation, Inc. is a Texas non-profit corporation organized to receive contributions and to borrow funds paying them over exclusively for the exempt purposes of the corporation.

The Sisters of Charity of the Incarnate Word, Houston, Texas is a Texas non-profit corporation organized exclusively for religious, charitable, and educational purposes, which purposes "shall be conducted and accomplished in the context of the theology, philosophy and other teachings and norms of the Roman Catholic Church."

Plaintiff Steve Seale is a taxpayer of Jasper Hospital District who resides in Precinct No. 2 of Jasper County, Texas, within the boundaries of Jasper Hospital District.

In this action, plaintiff seeks to enjoin defendants permanently from entering into a proposed lease agreement with the Sisters of Charity of the Incarnate Word-Houston, Texas and declaratory judgment that any such lease agreement would be void and illegal under Tex. Const. Art. I, Sections 6 and 7 and the Establishment Clause of the First Amendment to the U. S. Constitution.

Defendants have moved for summary judgment on the basis that plaintiff, as a taxpayer, lacks standing to bring his action. Defendants, to date, have not pleaded that the proposed lease is permissible under the Establishment Clause, and under Article I, Sections 6 & 7 of the Texas Constitution, nor have defendants denied or otherwise addressed plaintiff's claims and statements that plaintiff does not agree totally with all the tenets and teachings of the Roman Catholic Church.

2.

Summary Judgment Evidence

As summary judgment evidence (both in support of his motion and in response to defendants' motion), plaintiff Steve Seale offers:

(a) The live pleading on file herein;

(b) The judicial admissions contained in the second, third, fourth, fifth, and sixth paragraphs of Part II of defendants' motion for summary judgment on file herein and the matters contained in Item Nos. 3, 4, 5, and 6 of the affidavit of Robert Hall (president of both defendants) attached to and filed with defendants' motion for summary judgment (copies of the relevant portions of which are attached hereto);

(c) Defendants' response to plaintiff's request for admissions of fact No. 1 (concerning the genuineness of the letter of intent, copies of which, the response and letter, are attached);

(d) The attached copy of the Amended and Restated Articles of Incorporation of Sisters of Charity of the Incarnate Word, Houston, Texas, and certificate of the Secretary of State of Texas to the effect that such copies of the articles are true and correct copies of the original instrument on file in the office of the Secretary of State of Texas; and

(e) Plaintiff Steve Seale's attached affidavit.

All of the aforesaid matters are incorporated in this pleading by reference as summary judgment evidence, both in support of plaintiff's motion and in response to defendants' motion.

The summary judgment evidence establishes that there are no genuine issues as to any material fact and that plaintiff is entitled to partial summary judgment as a matter of law under Tex. R. Civ. P. 166a.

3.

Undisputed Facts

The following facts are undisputed:

1. Defendant Jasper Hospital District is a political subdivision of the State of Texas with the power to levy and collect taxes [Admissions in second, third, fourth, and fifth paragraphs of part II of defendants' motion for summary judgment and the matters contained in item Nos. 3, 4, 5, and 6 of the affidavit of Robert Hall attached to defendants' motion for summary judgment].

2. Sisters of Charity of the Incarnate Word, Houston, Texas is a Texas non-profit corporation. The purposes of the corporation "shall be conducted and accomplished in the context of. the philosophy and other teachings and norms of the Roman Catholic Church" [Amended and Restated Articles of Incorporation, Article One, Article IV].

3. Plaintiff Steve Seale is a resident, domiciliary, and taxpayer of Jasper Hospital District. He does not subscribe to all of the theology, philosophy, and other teachings and norms of the Roman Catholic Church. Further, plaintiff might desire medical treatment and services otherwise available to him from the defendant Jasper Hospital District which would violate the Ethical Policies –

Religious and Ethical Directives for Catholic Health Facilities as promulgated by the National Conference of Catholic Bishops [Seale's affidavit].

4. Plaintiff is a licensed attorney, and a reasonable, usual, and customary attorney's fee for plaintiff's work in this case is set forth in plaintiff's attached affidavit [Seale's affidavit].

5. Under the proposed lease in question, Sisters of Charity of the Incarnate Word, Houston, Texas would "not be required to provide services which violate Sisters of Charity of the Incarnate Word's Ethical Policies and the Religious and Ethical Directives for Catholic Health Facilities as promulgated by the National Conference of Catholic Bishops [Letter of Intent – Defendants' response to plaintiff's request for admissions No. 1].

4.

Plaintiff's Standing

The Supreme Court of the United States has addressed the issue of standing to assert an Establishment Clause issue. In *Flast vs. Cohen* 88 Sup Ct. 1942, 392 U.S. 83, 20 L. Ed. 2d 947 (1968), federal taxpayers were found to have standing to challenge the expenditure of federal funds for the purchase of textbooks and other instructional materials for use in parochial schools. The Court found that the Establishment Clause was a specific limitation even upon the Congress's taxing and spending power. The Supreme Court's reason was that Congress might employ its taxing and spending power to aid one religion over another religion.

Plaintiff has a stronger case of standing than the plaintiffs in *Flast vs. Cohen*, supra, in that plaintiff Seale has a very real and personal stake in the outcome of this cause for the reasons stated below. Plaintiffs' challenge is not an attack on an incidental expenditure (lease) of tax funds for the lease would entail transfer of a valuable interest in a substantial (if not total) amount of tax-acquired assets by the defendants. The lease involved herein will violate the Establishment Clause of the U. S. Constitution.

In the case of *Smith vs. County of Albemarle, VA.* 895 F. 2d 953 (4th Cir. 1990) (Cert. denied 111 Sup Ct. 74, 112 L. Ed 2d 48) the 4th Circuit Court of Appeals held that residents and taxpayers had standing to bring an Establishment Clause claim against the County, despite an absence of economic injury. The taxpayers in this case sued the county alleging that a nativity scene erected by local Jaycees on the front lawn of a county office building violated the Establishment Clause. The Court found for the taxpayers.

Plaintiff Seale demonstrates a direct and concrete impact upon himself and his family if the said lease is allowed. The question of whether or not the said lease is void or legal is not a political question; and therefore is not a non-justiciable question. Plaintiffs' challenge is not a generalized taxpayer complaint against the Jasper Hospital District. Plaintiffs' suit is a direct attack upon the Jasper Hospital District's forcing the "theology, philosophy, and other teachings and norms of the Roman Catholic Church" upon the Plaintiffs by their intended lease with the Sisters of Charity of the Incarnate Word – Houston, Texas.

5.

Excessive Entanglement

If Defendants are not enjoined as requested by plaintiff, the lease of defendants' facilities (acquired at least in part by tax dollars) to the Sisters of Charity, the Catholic faith would be aided and the Defendants have asserted that tax monies are not involved, that they are just receiving money from the Sisters of Charity in the way of rental income for the lease of Defendants' physical facilities. The Defendants also assert that the continued collection of tax monies will be used for providing indigent health care and that there will be no government entanglement with religion. The Defendants fail to acknowledge that they are leasing physical facilities and their assets which were obtained by substantial expenditures of tax monies in return for receipt of rental income from the Sisters of Charity.

The problem for Plaintiff Seale and other males occurs when Plaintiff Seale presents himself to Jasper Memorial Hospital after it has been leased to the Sisters of Charity for a vasectomy. The Sisters of Charity because of their Catholic faith, do not allow this procedure to be performed in their health care facilities. Plaintiff Seale's wife or any other woman would be unable (if that is what she and her physician so decide) to have an abortion or a tubal ligation, as these procedures are prohibited by the Religious and Ethical Directives for Catholic Health Facilities as promulgated by the national Conference of Catholic Bishops.

The case of *Lemon vs. Kurtzman* 403 U.S. 602, 91 Sup Ct. 2105, 29 L. Ed 2d. 745 (1971) established a three-prong test to judge whether or not a statute or government action violates the Establishment Clause of the First Amendment to the U. S. Constitution. The first prong of the Lemon test is whether or not the conduct has a secular purpose. At first glance, it would seem that the lease between defendants and Sisters of Charity of the Incarnate Word might have . the secular purpose of leasing defendants' hospitals facilities to Sisters of Charity of the Incarnate Word for the operation of the hospital. However, according to the Letter of Intent, Sisters of Charity of the Incarnate Word will not be required to perform any act that is prohibited by the National Conference of Catholic Bishops. Therefore, the lease would have the non secular purpose of prohibiting procedures with which the National Conference of Catholic Bishops disagree.

The second prong of the *Lemon* test is whether the principal effect of the challenged action is to advance or inhibit religion. The lease would advance Catholicism since no hospital procedures that are in opposition to the religious beliefs of Catholics would be allowed and because, as the articles of incorporation of Sisters of Charity of the Incarnate Word, Houston, Texas, state, the lessee's purposes "shall be conducted and accomplished in the context of the theology, philosophy, and other teachings and norms of the Roman Catholic Church."

The third prong of the *Lemon* test is whether or not the activity would create an excessive government entanglement with religion. The Letter of Intent states that the Jasper Hospital District will continue to collect taxes at

current levels to fund primary care development and indigent care services at the hospital and clinics. The entanglement occurs when a taxpayer presents himself to one of defendants' facilities for a medical procedure "prohibited by Sisters of Charity of the Incarnate Word's Ethical Policies and the Religious and Ethical Directives for Catholic Health Facilities as promulgated by the National Conference of Catholic Bishops." The defendants would obligate themselves to support and even enforce the tenets and teachings of the Roman Catholic Church in exclusion to all other medical religious viewpoints.

6.

Declaratory Relief, Attorney's Fees

The summary judgment evidence establishes that plaintiff has standing to bring and maintain this action. Plaintiff seeks the Court's declaration and judgment that the proposed written contract the subject of the letter of intent will be invalid and illegal, relief available under Tex. Civ. Prac. & Rem. Code § 37.004.

Under Tex. Civ. Prac. & Rem. Code § 37.009, plaintiff should be awarded his costs and attorney's fees as are equitable, reasonable, and just.

Plaintiff requests the Court to take judicial notice of the usual and customary attorney's fees in Jasper County and the contents of the case file in awarding such fees. Tex. Civ. Prac. & Rem. Code § 38.004.

7.

Objections

Plaintiff objects to defendants motion for summary judgment as follows:

(1) The motion on file with the Court fails to address plaintiff's Establishment Clause issues and Article 1, §§ 6 and 7, Texas Constitution issues, save and except such portions as have been adopted by reference by plaintiff as summary judgment evidence.

(2) The affidavit of Robert Hall attached to defendants' motion is immaterial in that it contains no matter which addresses plaintiff's Establishment Clause issues and Article 1, §§ 6 and 7, Texas Constitution issues, save and except such portions as have been adopted by reference by plaintiff as summary judgment evidence.

(3) The motion contains no summary judgment evidence which tends to overcome plaintiff's standing to maintain this action.

Timetables as to the filing of both plaintiff and defendants' motions for summary judgment have been dispensed with. Plaintiff reserves and requests a reasonable opportunity to object to and respond to any further matters raised by defendants in support of their motion for summary judgment and in opposition to this, plaintiff's motion for summary judgment.

Prayer

Wherefore, Steve Seale prays that his objections to defendants' motion for summary judgment be sustained; that defendants' motion for summary judgment be

denied; for partial summary judgment that defendants Jasper Hospital District and Jasper Memorial Hospital Foundation, Inc. be permanently enjoined from entering into any lease under the Letter of intent the subject of this action and for the Court's declaration and judgment that any such lease would violate the provisions of the Establishment Clause of the First Amendment of the United States Constitution and Article 1, §§ 6 and 7, Texas Constitution, and judgment for a reasonable, usual, and customary attorney's fee for the trial of this cause and all appeals of it, that he have his costs, and that he have such further relief to which he is justly entitled.

Respectfully submitted,

STEVE SEALE
132 E. Lamar
Jasper, Texas 75951
(409) 384-8611

/s/ Steve Seale
Steve Seale
SBN: 17947750

CERTIFICATE

I have complied with Tex. R. Civ. P. 21a.

/s/ Steve Seale
Steve Seale

[First Attachment to Plaintiff's Motion
for Partial Summary Judgment]

* * *

## II. BACKGROUND FACTS

The subject matter of this suit centers around the Lease to be entered into between Defendants and Sisters of Charity. Under the terms of the Lease, Sisters of Charity will lease and operate Defendant's hospital and related facilities.

Defendant, Jasper Memorial Hospital District (the "District"), was created in 1963 by the Texas Legislature pursuant to Article IX Section 9 of the Texas Constitution and pursuant to H.B. No. 377, Chapter 56, 58th Leg., p. 96, amended by S.B. 473, 58th Leg., p. 196, ch. 109. A true and correct copy of the legislative act creating the District is attached as Exhibit 1 to the Affidavit of Robert Hall which has been attached hereto as Exhibit A and is incorporated herein by reference.

The District owns and operates the Jasper Memorial Hospital and related facilities (the "Hospital") located in Jasper, Jasper County, Texas. *See* Affidavit of Robert Hall attached hereto as Exhibit A.

Defendant, Jasper Memorial Hospital Foundation, Inc. (the "Foundation"), is a private foundation organized to benefit the Hospital by providing funds for facilities and equipment for the Hospital. *See* Affidavit of Robert Hall attached hereto as Exhibit A.

The District and Sisters of Charity have entered into a letter of intent signed November 28, 1994, but effective as of November 22, 1994 (the "Letter of Intent"), pursuant to which Sisters of Charity make a definitive offer to enter into the Lease. The proposed closing date for consummating the Lease is February 28, 1995. *See* Affidavit of Robert Hall attached hereto as Exhibit A.

Under the terms of the Letter of Intent and the Lease, the District will lease the Hospital to Sisters of Charity for a term of 10 years. Sisters of Charity will also have an option to renew for the lease term for an additional 10 years. Sisters of Charity will pay rent to the District in accordance with the terms of the Lease and the amount of the rent during the initial 10 year lease term was determined based on the Hospital's earnings. It is estimated that the base rent will be $250,000.00 for the initial 10 year term. In addition, Sisters of Charity will pay more than $905,000.00 of the Hospital's outstanding indebtedness as of the date the lease term commences. *See* Affidavit of Robert Hall attached hereto as Exhibit A.

* * *

[Exhibit to First Attachment to Plaintiff's Motion for Partial Summary Judgment]

NO. 17484

| | | |
|---|---|---|
| STEVE SEALE | § | IN THE DISTRICT COURT |
| VS. | § | OF |
| JASPER HOSPITAL DISTRICT AND JASPER MEMORIAL HOSPITAL FOUNDATION, INC. | § | JASPER COUNTY, TEXAS |

AFFIDAVIT OF ROBERT HALL

| | |
|---|---|
| THE STATE OF TEXAS | § |
| | § |
| COUNTY OF JASPER | § |

BEFORE ME, the undersigned authority, on this date personally appeared Robert Hall, known to me to be the person whose name is subscribed below and hereinafter being first duly sworn, deposed and stated under oath the following:

1. My name is Robert Hall. I am of sound mind, over the age of 18 years and fully capable and competent to testify to the matters stated herein and have personal knowledge of all of the facts and statements made herein.

2. I am President of the Board of Directors of the Jasper Hospital District (the "District") and Jasper Memorial Hospital Foundation, Inc. (the "Foundation").

3. The District was created in 1963 by the Texas Legislature pursuant to Article IX, Section 9 of the Texas Constitution and pursuant to H.B. No. 377, Chapter 56,

58th Legislature, page 96, amended by S.B. 473, 58th Legislature, page 196, Chapter 109. A true and correct copy of the legislative act creating the District is attached hereto as Exhibit 1 and is incorporated herein by reference.

4. The District owns and operates the Jasper Memorial Hospital and related facilities (the "Hospital") located in Jasper, Jasper County, Texas.

5. The Foundation is a private foundation organized to benefit the Hospital by providing funds for facilities and equipment for the Hospital.

6. The District has entered into a letter of intent signed November 28, 1994, but effective as of November 22, 1994 (the "Letter of Intent") with Sisters of Charity of the Incarnate Word ("Sisters of Charity") pursuant to which Sisters of Charity make a definitive offer to the District to lease the Hospital. The proposed closing date for consummating the lease is February 28, 1995.

7. Under the terms of the Letter of Intent and the proposed lease, the District will lease the Hospital to Sisters of Charity for a term of 10 years. Sisters of Charity will have an option to renew the lease for a term of an additional 10

* * *

[Second Attachment to Plaintiff's Motion for Partial Summary Judgment]

* * *

II. PLAINTIFF'S FIRST REQUEST FOR ADMISSIONS

1. Admit that the attached is a genuine copy of the signed Letter of Intent between the Sisters of Charity of the Incarnate Word, Houston, Texas, and Defendants.

RESPONSE:

Admit.

2. Admit that the attached is a genuine copy of the Amended and Restated Articles of Incorporation of Sisters of Charity of the Incarnate Word, Houston, Texas, as filed in the Office of the Secretary of State of Texas on July 28, 1994.

RESPONSE:

Defendants are without sufficient knowledge to be able to admit or deny such request, but it appears to Defendants that such documents are what they purport to be.

3. Admit that in the above referenced Amended and Restated Articles of Incorporation the purposes for which the Corporation is organized exclusively are religious, charitable and educational.

RESPONSE:

Defendants are without sufficient knowledge to be able to admit or deny such request, but admit that the attached documents do include such statement.

4. Admit that the purposes in the above referenced Amended and Restated Articles of Incorporation "shall be conducted and accomplished in the context of the theology, philosophy and other teachings and norms of the Roman Catholic Church."

RESPONSE:

Defendants are without sufficient knowledge to admit or deny this request, but do admit that such statement is contained such document.

* * *

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[Continuation of Second Attachment to Plaintiff's Motion for Partial Summary Judgment]

[LOGO]

Sisters of Charity
——— of the ———
Incarnate Word

Jasper Hospital District
P.O. Box 1943
Jasper, Texas

Re: Jasper Memorial Hospital, Jasper, Texas

Attn: Robert Hall
Chairman of the Board

Dear Mr. Hall:

This letter ("Letter of Intent") will constitute a definitive offer setting forth the terms under which Sisters of Charity of the Incarnate Word, Houston, Texas ("SCH") will

lease the Jasper Memorial Hospital and its clinics, operating and related assets described below subject to negotiation and execution of a definitive lease agreement ("Lease Agreement").

1. *The Parties.* The lessors will be Jasper Hospital District ("District") which is a governmental body created by legislative action, and Jasper Memorial Hospital Foundation, Inc. ("Foundation") a Texas nonprofit corporation. SCH will be the lessee.

2. *Assets.*

2.1 *Assets to be Leased.* Subject to definition in the Lease Agreement, SCH will lease all of the right, title and interest of the District in Jasper Memorial Hospital (the "Hospital") located at 1275 Marvin Hancock Drive, Jasper, Texas; and of the District and the Foundation in the medical office and clinic buildings and related facilities ("Office and Clinic Buildings") at Jasper, Kirbyville, Lake Rayburn and Newton. As defined in the Lease Agreement, SCH intends to lease all of District's and Foundation's rights to the following used in connection with the Hospital, Office and Clinic Buildings: vehicles; fixtures; medical and other equipment; data processing hardware and software (to the extent transferrable); contracts (to the extent SCH elects to assume), licenses and permits (to the extent transferrable); patient records, medical and clinical records; and furniture and furnishings all located in or adjacent to the Hospital, Office and Clinic Buildings (collectively, the "Assets"). To the extent the District purchases or receives donations of other mutually agreed upon equipment, District and SCH agree that the Lease Agreement may be modified to include such equipment.

2.2 *Excluded Assets.* SCH is not purchasing any current assets, except to the extent the parties identify inventory, supplies and certain prepaid assets as negotiated and described in a bill of sale in connection with the Lease Agreement. While accounts receivable will not be purchased SCH will offer the District the services of TLRA, its collection services unit, under a separate agreement.

2.3 *Liabilities.* SCH will not assume any of District's or Foundation's liabilities. To the extent SCH elects to assume contracts or leases, SCH will assume all obligations under such contracts and leases involving or benefitting the Hospital, Office and Clinic Buildings which accrue after the Closing.

3. *Lease Terms.* The Lease Agreement will be for at least ten (10) years with option to renew for at least an additional ten (10) years. The rent for the Hospital, Office, and Clinic Buildings will be based on the two most recently completed fiscal years' earnings before depreciation, interest and taxes times an industry standard amortized over ten years and is estimated to be $250,000. The rent will be finally agreed upon based on the District's most recent audit and due diligence with respect to the Hospital's contracts and other liabilities and the District's commitment of tax revenues at the current level for indigent and primary care in paragraph 15. The rent as mutually agreed upon will be payable annually in advance. Additionally SCH will pay the District's long term debt and short term notes payable in the amount of $905,000 as shown in the District's most recent audit. To the extent SCH has elected to purchase, the purchase price for inventory, supplies and certain prepaid assets will be determined based on a physical count

and pricing as of the Closing Date. The Lease Agreement will provide that SCH will make available adequate capital for operating, appropriate services of the Hospital. Further, SCH will operate the Hospital in accord with the charity care, government sponsored, indigent care and community benefits requirements of Senate Bill 427. The lease Agreement will provide that SCH will not be required to provide services which violate SCH's Ethical Policies and the Religious and Ethical Directives for Catholic Health Facilities as promulgated by the National Conference of Catholic Bishops, subject to provision for existing family planning services consistent with such Directives. The Lease Agreement will also provide that SCH will not own, lease, manage or operate another acute care hospital within Jasper County, during the term of the Lease Agreement and for a period of three years thereafter.

4. *Access.* Promptly following execution of this Letter of Intent by SCH, District and Foundation shall provide SCH with reasonable access to the financial, operational and statistical books and records of the Hospital and the Foundation in its possession. District and Foundation shall permit SCH to conduct environmental assessments and physical inspections of the facilities, buildings and properties of the Assets which will not disrupt delivery of care to patients. SCH and its agents or representatives may direct any inquiry to, or any communication with, the Hospital and Foundation or any employee or representative of the Hospital and Foundation or any member of its Medical Staff with respect to the lease of the Assets.

5. *Lease Adjustments and Allocation.* Utilities, payments under assumed contracts, and the like will be prorated at a closing as provided for in the Lease Agreement. Allocation of the rent shall be mutually agreed to by the parties in the Lease Agreement.

6. *Closing Date.* The parties shall use their best efforts to enter into the Lease Agreement and to close the transaction (the "Closing") as soon as practicable. The Closing shall take place on the last day of any month in which all required regulatory and other approvals and legally required notice periods to such closing have been obtained or met but in no event later than ninety (90) days from the Effective Date of this Letter of Intent, unless otherwise mutually agreed. The Closing will be held in Jasper, Texas.

7. *SCH Regional Board Representation.* SCH contemplates creating a regional board for its Southeast Texas facilities, which would include Jasper Memorial Hospital if the transaction contemplated by this letter is completed. In such event it is intended that the Jasper Memorial Hospital Board or the District will have representation on the regional board along with representatives of other SCH facilities within the Southeast Texas region.

8. *Conditions Precedent.* In order for SCH and District to consummate the proposed transaction, the obligations of this offer are conditioned on the following:

8.1 *Definitive Lease Agreement.* The Lease Agreement with customary provisions which are mutually agreeable to the parties must be negotiated and executed. The parties shall in good faith negotiate and

use their reasonable best efforts to execute the Lease Agreement. The Lease Agreement will contain certain representations and warranties, conditions and indemnifications by District, Foundation and SCH.

8.2 *Approvals and Deliveries.* Closing of the transaction is also subject to satisfaction of these Closing conditions: (i) obtaining all required regulatory, governmental and quasi-governmental approvals; (ii) maintaining JCAHO accreditation and licenses currently in effect on the date hereof; and (iii) delivery of conveyance documents reasonably satisfactory to SCH and District; (iv) obtaining necessary Board approvals; and (v) meeting legally required notice periods.

9. *Expenses.* District, Foundation and SCH shall each pay all its fees, costs and expenses and those of its agents, advisers, attorneys and accountants with respect to the negotiation of this Letter of Intent, the negotiation of the Lease Agreement and the closing. SCH agrees to pay all recording fees, transfer fees, transfer taxes, the cost for its mechanical/electrical/structural and environmental consultants, and such other costs identified in the Lease Agreement.

10. *Confidentiality.* District, Foundation and SCH agree that any and all information relating to the Assets or to the Hospital, District and Foundation that may be furnished by offices, directors, employees or agents of District and Foundation pursuant to Section 4 above or otherwise (collectively, the "Information") will be kept strictly confidential to the extent permitted under the Texas Open Records Act and shall not be disclosed to any person or entity without the consent of the Hospital, the District or the Foundation. SCH agrees (i) to inform all of

its representatives who receive the information of the confidential nature of such information and agrees to direct all such representatives to treat such information confidentially and not to use it other than for the purpose of analyzing and evaluating the proposed transaction described in this Letter of Intent; (ii) to be responsible in any event for any breach of this agreement by and any of its agents or representatives; and (iii) to make all necessary and appropriate efforts to safeguard the information from disclosure to anyone other than as permitted hereby. In the event a Lease Agreement is executed but the transaction is not closed or this requirement terminates by its terms without execution of a Lease Agreement, SCH agrees immediately to return the information and all copies thereof which District and Foundation have furnished to SCH. All oral information shall remain subject to the terms of this section 10; the foregoing restrictions with respect to the Information shall not apply to any information which (i) is, on the date hereof, or thereafter becomes, generally available to the public other than as a result of a disclosure, directly or indirectly, by SCH or its representatives; (ii) becomes available to SCH on a non-confidential basis from a source other than District or such representatives, which source was not itself bound by a confidentiality agreement with District or such representatives and did not receive such information, directly or indirectly, from a person or entity so bound; or (iii) is required to be disclosed pursuant to open records laws, subpoena or other lawful means.

11. *Public Announcement.* District and SCH mutually agree to refrain from making a public announcement of the transaction which is the subject of this Letter of Intent

without the prior consent of the other party, except where a public announcement is required by law as reasonably determined by such party, and, in any event, public announcements will be mutually agreed upon. SCH will provide public relations and communication assistance to the District in coordinating public announcements.

12. *No Broker.* Each party represents to the other that there is no person or entity entitled to any finder's fee, brokerage fee or the like based on any transaction resulting from this Letter of Intent.

13. *No Contract.* It is expressly understood that this Letter of Intent (except for Sections 4, 8, 9, 10, 11, 12, 13 and 14) is not a binding contract and that no party shall be entitled to any recourse, in the form of damages, or otherwise, for expenses incurred or benefit conferred or lost before or after the date of this Letter of Intent in the event that there is a failure, for any reason, of the parties to agree on a term or on terms and provisions of a Lease Agreement. The parties will exclusively negotiate and cooperate in negotiating a Lease Agreement providing for the transaction contemplated by this Letter of Intent until February 28, 1995, but each party reserves the right of final approval or disapproval, for any reason, of such documentation prior to execution.

14. *Employees.* SCH cannot determine at this time whether or not SCH will hire for employment any or all employees employed by the Hospital as of immediately prior to the Closing. SCH agrees to offer opportunities for employment with all District employees at the Hospital, Office and Clinic buildings. In addition, SCH has

expressed to the Hospital, the district, and the Foundation that it is SCH's present intention to continue the Hospital's operations, for the immediately foreseeable future, at the affected facilities, to offer employment to at least 90% of the employees terminated by the Hospital, the District, and the Foundation, at closing and to retain those who accept employment in SCH's active employ for a period of at least 60 days from and after the date of Closing. The District assumes all responsibility for payment of all benefits accrued to time of Closing, if any, to all employees.

15. *District's Public Responsibilities.* District recognizes its public responsibilities to foster and improve access to health care for the District's residents and tax payers. District intends to use its tax revenues at current levels to fund primary care development and indigent care services at the Hospital and Clinics.

16. *Termination of this Letter.* This Letter of Intent may be terminated at any time, without any obligation or liability only under the following conditions: (i) by the mutual written agreement of the parties hereto; or (ii) by either party after February 28, 1995, if the parties have not entered into a Lease Agreement on or before such date; or (iii) subject to Section 4 above, by SCH on or before execution of the Lease Agreement, if SCH's due diligence review does not show substantive results reasonably acceptable to SCH.

District and Foundation, by execution of this Letter of Intent, agrees to enter into exclusive negotiations with SCH until such time as a Lease Agreement is signed or the Letter of Intent is terminated under Section 16.

The execution of this Letter of Intent by the District is not, nor is it intended, to be a contracting away of the government authority of the District.

If you are in agreement with the terms of this letter, please sign both enclosed copies and deliver both copies to me by November 22, 1994, the Effective Date of this Letter of Intent. One copy will be signed and returned to you.

Very truly yours,

Sisters of Charity of the incarnate Word,
Houston, Texas

By: /s/ Daniel J. Wolterman
Daniel J. Wolterman
Senior Vice President Operations

Accepted and Agreed
to this 28th day of
NOVEMBER, 1994

Jasper Hospital District

By: /s/ Robert Hall
Robert Hall
Chairman of
the Board

Jasper Memorial Hospital Foundation, Inc.

By: /s/ Robert J. Hall
Printed Name
Title: President

[Third Attachment to Plaintiff's Motion for Partial Summary Judgment]

[LOGO]

**The State of Texas**

*SECRETARY OF STATE*

The undersigned, as Secretary of State of the State of Texas, HEREBY CERTIFIES that the attached is a true and correct copy of the following described instruments on file in this office:

SISTERS OF CHARITY OF THE INCARNATE WORD, HOUSTON, TEXAS

RESTATED ARTICLES OF INCORPORATION

JULY 28, 1994

[LOGO] *IN TESTIMONY WHEREOF, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in the City of Austin, on February 27, 1995.*

/s/ Antonio O. Garza, Jr. *CEB*
*Antonio O. Garza, Jr.*
*Secretary of State*

[Continuation of Third Attachment to Plaintiff's Motion for Partial Summary Judgment]

**AMENDED AND RESTATED ARTICLES OF INCORPORATION OF SISTERS OF CHARITY OF THE INCARNATE WORD, HOUSTON, TEXAS**

(Filed Jul. 28, 1994)

## ARTICLE ONE

Sisters of Charity of the Incarnate Word, Houston, Texas, pursuant to the provisions of Articles 4.03 and 4.06 of the Texas Non-Profit Corporation Act, hereby adopts Amended and Restated Articles of Incorporation which accurately copy the Articles of Incorporation (as previously restated) and all amendments thereto that are in effect to date and as further amended by such Amended and Restated Articles of Incorporation as hereinafter set forth and which contain no other change in any provision thereof.

## ARTICLE TWO

The name of the corporation is Sisters of Charity of the Incarnate Word, Houston, Texas.

## ARTICLE THREE

The Articles of Incorporation (as previously restated) of the corporation are amended by these Amended and Restated Articles of Incorporation as follows:

Article IV of the Articles of Incorporation (as previously restated) is hereby amended so as to read as follows:

## ARTICLE IV

The purposes for which the Corporation is organized exclusively are religious, charitable and educational.

They shall be conducted and accomplished in the context of the theology, philosophy and other teachings and norms of the Roman Catholic Church. The Corporation is formed to carry on Jesus Christ's healing ministry by providing health care to all persons and supporting the handicapped and elderly, without regard to the beneficiaries' ability to pay, to the extent of, and within the limits of, the Corporation's resources, through the operation of health care and associated activities, programs, networks, facilities and institutions. It is also a purpose of the Corporation to aid, to lend financial support and assistance to, and to invest and/or dispose of its funds for the use and benefit of, and in furtherance of the purposes of the Corporation, and the SCH Health Care System, which shall be determined and designated by the Members from time to time.

The Corporation shall have and exercise all the rights and powers conferred on nonprofit corporations under the laws of Texas. Its assets are pledged for use in performing its charitable functions, and it shall be operated in such a way that it does not result in private gain or distributable profits. It shall conduct its activities and carry out its purposes without regard to race, color, creed, religion, gender, orientation, disability, age, or national origin.

Article VI of the Articles of Incorporation (as previously restated) is hereby amended so as to read as follows:

ARTICLE VI

The number of directors now constituting the Board of Directors of the Corporation is thirteen (13). The names

and addresses of the persons who are serving as Directors are:

| Name | Address |
|---|---|
| Sister Elizabeth Ann Hays | 6510 Lawndale Avenue<br>Houston, TX 77023 |
| Stanley T. Urban | 2600 North Loop West<br>Houston, TX 77092 |
| Sister Loyola Hegarty | St. Elizabeth Hospital<br>2830 Calder Avenue<br>Beaumont, TX 77702 |
| Rev. Robert E. Lampert, Ph.D. | Oblate School of Theology<br>285 Oblate Drive<br>San Antonio, TX 78216 |
| Sister M. Rose McPhee | 2026 Guadalupe Street<br>Austin, TX 78705 |
| Sister Christina Murphy | 6510 Lawndale Avenue<br>Houston, TX 77023 |
| Duane L. Newland | 4555 W. Loch Alpine Dr.<br>Ann Arbor, MI 48103 |
| Sister Mary Bernice O'Keefe | Saint Patrick Hospital<br>524 S. Ryan Street<br>Lake Charles, LA<br>70602-3402 |
| Daniel J. Rissing | The Toledo Hospital<br>2142 N. Cove Boulevard<br>Toledo, OH 43606 |
| Sister Rose Scanlan | 6510 Lawndale Avenue<br>Houston, TX 77023 |
| B. A. Steinhagen | 3850 IH 10 South<br>Beaumont, TX 77704 |
| Donald L. Holmquest, M.D., J.D. | Holmquest & Associates<br>3721 Tangley<br>Houston, TX 77005-2031 |

Carl F. Myers, M.D. — Vice President of Medical Affairs Intergroup Healthcare Corp. 1010 N. Finance Center Drive Tucson, AZ 85710

The Board of Directors of the Corporation shall consist of such Directors as the Members of the Corporation may elect from time to time, as provided in the Bylaws of the Corporation, and may include ex officio directors as provided in such Bylaws. To the fullest extent permitted by Texas statutes, as the same exists or may hereafter be amended, a Director of the Corporation shall not be liable to the Corporation or its Members for monetary damages for an act or omission in the Director's capacity as a Director.

Article VII of the Articles of Incorporation (as previously restated) is hereby amended so as to read as follows:

ARTICLE VII

The Corporation shall have the powers authorized by the Texas Non-Profit Corporation Act. The Corporation shall have power to make gifts and grants exclusively for religious, charitable or educational purposes to entities of the SCH Health Care System wherever located, exclusively for their religious, charitable or educational purposes, and to make gifts and grants for other lawful religious, charitable or educational purposes.

Without in any way limiting the powers, privileges and rights conferred upon the Members of the Corporation by the Texas Non-Profit Corporation Act or the general laws of the State of Texas, and without limitation by enumeration, the following powers are reserved exclusively to the Members of the Corporation and the matters set forth in this Article VII shall not be valid as action by the Corporation until these matters have been submitted to the Members of the Corporation for:

(a) approval of any amendment, modification or restatement of the Corporation's Articles of Incorporation or its Bylaws;

(b) approval of any sale, lease, mortgage or other transfer or encumbrance of the real property of the Corporation and of the entities of the SCH Health Care System;

(c) approval of any merger, acquisition, consolidation, liquidation or dissolution of the Corporation and of the entities of the SCH Health Care System;

(d) election of Directors of the Corporation and any removal of any Directors so elected, at any time, with or without cause;

(e) appointment and removal, at any time, with or without cause, of the President, who shall serve as the chief executive officer of the Corporation; the Chair; and the Vice Chair of the Board of the Corporation;

(f) determination and designation of the SCH Health Care System; and

(g) approval of any approval of the mission, the philosophy, and the strategic or mission

plan of the Corporation or the SCH Health Care System.

The Members may develop policies, directions and interpretations implementing or clarifying the foregoing reserved powers.

Article VIII of the Articles of Incorporation (as previously restated) is hereby amended so as to read as follows:

ARTICLE VIII

No part of the net earnings of the Corporation shall inure to the benefit of any private shareholder or individual, within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986, or corresponding provisions of subsequent federal tax laws and regulations. No dividend shall be paid and no part of the income of the Corporation shall be distributed to its Members, Directors or officers; provided that the Corporation may confer benefits upon its Members in conformity with its purposes and may pay compensation in a reasonable amount to Directors or officers for services rendered. No substantial part of its activities shall be the carrying on propaganda, or otherwise attempting to influence legislation, and it shall not participate in, or intervene in (including the publication or distribution of statements) any political campaign on behalf of any candidate for public office. Furthermore, the Corporation shall not conduct or carry on any activities not permitted to be conducted or carried on by an organization exempt under Section 501(c)(3) of the Internal Revenue Code of 1986, or corresponding provisions of subsequent federal tax laws or regulations,

or by an organization contributions to which are deductible under Section 170(c)(2) of such Code, or corresponding provisions of subsequent tax laws or regulations, or the laws of the State of Texas.

The Corporation and the entities of the SCH Health Care System are and always shall be instrumentalities of the Roman Catholic Church. They shall be managed and directed according to the doctrines, disciplines, laws, rules and regulations of the Roman Catholic Church, the constitutions, directives, resolutions and decrees of the Congregation, and the ethical and religious directives for Catholic health facilities as approved by the National Conference of Catholic Bishops.

Pursuant to Section 6.02 of the Texas Non-Profit Corporation Act, upon the liquidation, dissolution, or winding up of the Corporation, after paying or making provision for the payment of all of the debts and obligations of the Corporation, any remaining assets of the Corporation shall be distributed exclusively for purposes similar to those of the Corporation in such manner or to such nonprofit organization or organizations organized and operated exclusively for religious, charitable or educational purposes, as shall at the time qualify as an exempt organization or organizations under Section 501(c)(3) of the Internal Revenue Code of 1986, or corresponding provisions of subsequent federal tax laws or regulations, as the Directors of the Corporation, with the approval of the Members, shall determine in conformity with the Canon Law of the Roman Catholic Church. No Director or officer of the Corporation, or any other individual, shall be entitled to share in the distribution of any

of the Corporation's assets on dissolution of the Corporation.

Article IX of the Articles of Incorporation (as previously restated) is hereby amended so as to read as follows:

ARTICLE IX

The street address of the registered office of the Corporation is 811 Dallas Avenue, Houston, Texas 77002, and the name of the registered agent at that address is C.T. Corporation. The principal office of the corporation shall be 2600 North Loop West, Houston, Texas 77092.

ARTICLE FOUR

Each such amendment made by these Amended and Restated Articles of Incorporation has been effected in conformity with the provisions of the Texas Non-Profit Corporation Act and such Amended and Restated Articles of Incorporation were duly adopted in the following manner:

The Amended and Restated Articles of Incorporation as so amended were adopted at a meeting of members held on June 15, 1994, at which a quorum was present, and the Amended and Restated Articles of Incorporation as so amended received at least two-thirds of the votes which members present or represented by proxy at such meeting were entitled to cast.

ARTICLE FIVE

The Articles of Incorporation (as previously restated) and all amendments and supplements thereto are hereby superseded by the following Restated Articles of Incorporation which accurately copy the entire text thereof and as amended as above set forth:

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**RESTATED ARTICLES OF INCORPORATION**
**OF**
**SISTERS OF CHARITY OF THE INCARNATE WORD, HOUSTON, TEXAS**

ARTICLE I

The name of the corporation is Sisters of Charity of the Incarnate Word, Houston, Texas ("Corporation").

ARTICLE II

The Corporation is a nonprofit corporation. It is organized pursuant to the Texas Non-Profit Corporation Act for non-profit purposes and does not contemplate pecuniary gain or profit.

ARTICLE III

The period of the Corporation's duration is perpetual.

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## ARTICLE IV

The purposes for which the Corporation is organized exclusively are religious, charitable and educational. They shall be conducted and accomplished in the context of the theology, philosophy and other teachings and norms of the Roman Catholic Church. The Corporation is formed to carry on Jesus Christ's healing ministry by providing health care to all persons and supporting the handicapped and elderly, without regard to the beneficiaries' ability to pay, to the extent of, and within the limits of, the Corporation's resources, through the operation of health care and associated activities, programs, networks, facilities and institutions. It is also a purpose of the Corporation to aid, to lend financial support and assistance to, and to invest and/or dispose of its funds for the use and benefit of, and in furtherance of the purposes of the Corporation, and the SCH Health Care System, which shall be determined and designated by the Members from time to time.

The Corporation shall have and exercise all the rights and powers conferred on nonprofit corporations under the laws of Texas. Its assets are pledged for use in performing its charitable functions, and it shall be operated in such a way that it does not result in private gain or distributable profits. It shall conduct its activities and carry out its purposes without regard to race, color, creed, religion, gender, orientation, disability, age, or national origin.

## ARTICLE V

The Members of the Corporation shall be the persons who have been duly elected and installed from time to time as the General Superior and the General Council of the Congregation of the Sisters of Charity of the Incarnate Word (the Congregation), a Pontifical Institute of Consecrated Life of the Roman Catholic Church which was approved and confirmed as a congregation of simple vows by His Holiness Pope Benedict XV on July 16, 1916, and which has its Motherhouse at Villa de Matel in Houston, Texas, in the Diocese of Galveston-Houston.

The Corporation shall have only one class of Members. Each Member shall be entitled to one (1) vote on each matter submitted to a vote of the Members. No Member may transfer or assign her membership in the Corporation.

## ARTICLE VI

The number of directors now constituting the Board of Directors of the Corporation is thirteen (13). The names and addresses of the persons who are serving as Directors are:

| Name | Address |
|---|---|
| Sister Elizabeth Ann Hayes | 6510 Lawndale Avenue<br>Houston, TX 77023 |
| Stanley T. Urban | 2600 North Loop West<br>Houston, TX 77092 |
| Sister Loyola Hegarty | St. Elizabeth Hospital<br>2830 Calder Avenue<br>Beaumont, TX 77702 |

| | |
|---|---|
| Rev. Robert E. Lampert, PhD. | Oblate School of Theology<br>285 Oblate Drive<br>San Antonio, TX 78216 |
| Sister M. Rose McPhee | 2026 Guadalupe Street<br>Austin, TX 78705 |
| Sister Christina Murphy | 6510 Lawndale Avenue<br>Houston, TX 77023 |
| Duane L. Newland | 4555 W. Loch Alpine Dr.<br>Ann Arbor, MI 48103 |
| Sister Mary Bernice O'Keefe | Saint Patrick Hospital<br>524 S. Ryan Street<br>Lake Charles, LA 70602-3402 |
| Daniel J. Rissing | The Toledo Hospital<br>2142 N.Cove Boulevard<br>Toledo, OH 43606 |
| Sister Rose Scanlan | 6510 Lawndale Avenue<br>Houston, TX 77023 |
| B. A. Steinhagen | 3850 IH 10 South<br>Beaumont, TX 77704 |
| Donald L. Holmquest, M.D., J.D. | Holmquest & Associates<br>3721 Tangley<br>Houston, TX 77005-2031 |
| Carl F. Myers, M.D. | Vice President of Medical Affairs<br>Intergroup Healthcare Corp.<br>1010 N. Finance Center Drive<br>Tucson, AZ 85710 |

The Board of Directors of the Corporation shall consist of such Directors as the Members of the Corporation

may elect from time to time, as provided in the Bylaws of the Corporation, and may include ex officio directors as provided in such Bylaws. To the fullest extent permitted by Texas statutes, as the same exists or may hereafter be amended, a Director of the Corporation shall not be liable to the Corporation or its Members for monetary damages for an act or omission in the Director's capacity as a Director.

## ARTICLE VII

The Corporation shall have the powers authorized by the Texas Non-Profit Corporation Act. The Corporation shall have power to make gifts and grants exclusively for religious, charitable or educational purposes to entities of the SCH Health Care System wherever located, exclusively for their religious, charitable or educational purposes, and to make gifts and grants for other lawful religious, charitable or educational purposes.

Without in any way limiting the powers, privileges and rights conferred upon the Members of the Corporation by the Texas Non-Profit Corporation Act or the general laws of the State of Texas, and without limitation by enumeration, the following powers are reserved exclusively to the Members of the Corporation and the matters set forth in this Article VII shall not be valid as action by the Corporation until these matters have been submitted to the Members of the Corporation for:

(a) approval of any amendment, modification or restatement of the Corporation's Articles of Incorporation or its Bylaws;

(b) approval of any sale, lease, mortgage or other transfer or encumbrance of the real property of the Corporation and of the entities of the SCH Health Care System;

(c) approval of any merger, acquisition, consolidation, liquidation or dissolution of the Corporation and of the entities of the SCH Health Care System;

(d) election of Directors of the Corporation and any removal of any Directors so elected, at any time, with or without cause;

(e) appointment and removal, at any time, with or without cause, of the President, who shall serve as the chief executive officer of the Corporation; the Chair; and the Vice Chair of the Board of the Corporation;

(f) determination and designation of the SCH Health Care System; and

(g) approval of any approval of the mission the philosophy, and the strategic or mission plan of the Corporation or the SCH Health Care System.

The Members may develop policies, directions and interpretations implementing or clarifying the foregoing reserved powers.

## ARTICLE VIII

No part of the net earnings of the Corporation shall insure to the benefit of any private shareholder or individual, within the meaning of Section 501(c)(3) of the Internal Revenue Code of 1986, or corresponding provisions of subsequent federal tax laws and regulations. No

dividend shall be paid and no part of the income of the Corporation shall be distributed to its Members. Directors or officers; provided that the Corporation may confer benefits upon its Members in conformity with its purposes and may pay compensation in a reasonable amount to Directors or officers for services rendered. No substantial part of its activities shall be the carrying on propaganda, or otherwise attempting to influence legislation, and it shall not participate in, or intervene in (including the publication or distribution of statements) any political campaign on behalf of any candidate for public office. Furthermore, the Corporation shall not conduct or carry on any activities not permitted to be conducted or carried on by an organization exempt under Section 501(c)(3) of the Internal revenue Code of 1986, or corresponding provisions of subsequent federal tax laws or regulations, or by an organization contributions to which are deductible under section 170(c)(2) of such Code, or corresponding provisions of subsequent tax laws or regulations, or the laws of the State of Texas.

The Corporation and the entities of the SCH Health Care System are and always shall be instrumentalities of the Roman Catholic Church. They shall be managed and directed according to the doctrines, disciplines, laws, rules and regulations of the Roman Catholic Church, the constitutions, directives, resolutions and decrees of the Congregation, and the ethical and religious directives for Catholic health facilities as approved by the National Conference of Catholic Bishops.

Pursuant to Section 6.02 of the Texas Non-Profit Corporation Act, upon the liquidation, dissolution, or winding up of the Corporation, after paying or making

provision for the payment of all of the debts and obligations of the Corporation, any remaining assets of the Corporation shall be distributed exclusively for purposes similar to those of the Corporation in such manner or to such nonprofit organization or organizations organized and operated exclusively for religious, charitable or educational purposes, as shall at the time qualify as an exempt organization or organizations under Section 501(c)(3) of the Internal Revenue Code of 1986, or corresponding provisions of subsequent federal tax laws or regulations, as the Directors of the Corporation, with the approval of the Members, shall determine in conformity with the Canon Law of the Roman Catholic Church. No Director or officer of the Corporation, or any other individual, shall be entitled to share in the distribution of any of the Corporation's assets on dissolution of the Corporation.

## ARTICLE IX

The street address of the registered office of the Corporation is 811 Dallas Avenue, Houston, Texas 77002, and the name of the registered agent at that address is C.T. Corporation. The principal office of the corporation shall be 2600 North Loop West, Houston, Texas 77092.

## MEMBERS CERTIFICATE

The foregoing Articles are adopted as, and for, the Articles of Incorporation of Sisters of Charity of the incarnate Word, Houston, Texas, and all Articles of the Corporation previously in effect are hereby repealed, this 15th day of June A.D., 1994, the Feast of St. Laudelin by action

of the Members of the Corporation at a meeting at which all Members were present and signify their unanimous approval by signature hereto.

/s/ Sister Elizabeth Ann Hayes
Sister Elizabeth Ann Hayes

Sister Rose Scanlan
Sister Rose Scanlan

Sister Christina Murphy
Sister Christina Murphy

Sister Kevina Keating
Sister Kevina Keating

Sister Marie Bernarde Clancy
Sister Marie Bernarde Clancy

ACKNOWLEDGEMENT

Dated and Executed for the purposes of identification and acknowledgement on July 21 , A.D., 1994 , the Feast of Saint Lawrence .

SISTERS OF CHARITY OF THE INCARNATE WORD, HOUSTON, TEXAS

By: /s/ Stanley T. Urban
Stanley T. Urban
President

/s/ Margaret E. Conyers
Margaret E. Conyers
Secretary

[SEAL]

SECRETARY'S CERTIFICATE

This is the certify that the foregoing Restated Articles of Incorporation of Sisters of Charity of the incarnate Word, Houston, Texas, have been duly acknowledged and accepted by the Board of Directors of said Corporation at a meeting of said Board held on July 21, 1994 .

IN WITNESS THEREOF, the undersigned, duly elected and acting Secretary of the Corporation, has signed this Certificate and affixed the seal of the Corporation hereon this 21st day of July 1994 .

By /s/ Margaret E. Conyers
Margaret E. Conyers
Secretary

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[Fourth Attachment to Plaintiff's Motion for Partial Summary Judgment]

No. 17,484

| | | |
|---|---|---|
| STEVE SEALE, ET AL | § | IN THE DISTRICT COURT |
| VS. | § | OF |
| JASPER HOSPITAL DISTRICT, ET AL | § | JASPER COUNTY, TEXAS |

AFFIDAVIT OF STEVE SEALE

Before me, the undersigned authority, personally appeared Steve Seale, who being first duly sworn upon his oath deposed and said:

"My name is Steve Seale, and I am over twenty-one years of age, am under no legal disability, have never been convicted of a felony or of a crime involving moral turpitude, and have personal knowledge of the facts set forth in this affidavit, which facts are true and correct.

"I reside and am domiciled in Jasper County, Texas, within the boundaries of Jasper Hospital District, and I am a taxpayer of Jasper Hospital District.

"I do not subscribe to all of the theology, philosophy, and other teachings and norms of the Roman Catholic Church.

"My family physician is on staff of Jasper Memorial Hospital and I do not wish or desire to be bound to receive only such medical services as are in keeping with the Religious and Ethical Directives for Catholic Health Facilities as promulgated by the National Conference of Catholic Bishops and any other tenets and teachings of the Roman Catholic Church.

"I am licensed as an attorney and counselor of law by the Supreme Court of the State of Texas. I practice law for a living in Jasper County, Texas and have practiced law in Jasper County since 1987.

"I am familiar with customary fees and charges of attorneys practicing law in Jasper County, Texas, and a reasonable fee for an attorney's services rendered in a matter such as is before the Court is $125.00 per hour.

"I am not aware of the issues in this case being litigated in recent memory in Jasper County, Texas. It is my belief that this case involves sensitive issues because the case involves suit against a political subdivision of

the State of Texas and involves the religious beliefs of the Roman Catholic Church.

"I have spent in excess of 300 hours in connection with this case. Two-thirds of my time was spent on library research in order to satisfy the Court that I have standing to bring the case, that there exists a justiciable controversy before the Court, and that defendants' motion for summary judgment, motion to dismiss, pleas in abatement, and special exceptions are without merit and to explore and present my Rule 12 motion.

"I do not regularly try cases of this nature before this Court. I believe, however, and it is my opinion as an attorney licensed to practice law in the State of Texas, regularly practicing law in Jasper County, Texas, that a reasonable, usual, customary, and necessary attorney's fee for me to recover in this case is $25,000.00 for trial of this case, to date, before this Court, plus the sum of $7,500.00 for an appeal to the Court of Appeals, plus the sum of $7,500.00 for making or responding to an application for writ of error to the Supreme Court of Texas, plus $5,000.00 for an appeal to the Supreme Court of Texas in the event a writ of error is granted, plus the sum of $20,000.00 for making or responding to an application for writ of certiorari to the Supreme Court of the United States of America, plus the sum of $15,000.00 in the event such writ is granted by the United States Supreme Court."

Further, Affiant says nothing.

/s/ Steve Seale
Steve Seale, Affiant

Sworn to and subscribed before me, the undersigned Notary Public, on this 27th day of February, 1995.

(SEAL) **AMY MATTER**
NOTARY PUBLIC
State of Texas
Comm. Exp. 04-09-98

/s/ Amy Matter
Notary Public in and
for the State of Texas

No. 17484

| | | |
|---|---|---|
| STEVE SEALE, ET AL | § | IN THE DISTRICT COURT |
| VS. | § | OF |
| JASPER HOSPITAL DISTRICT AND JASPER MEMORIAL HOSPITAL FOUNDATION, INC. | § | JASPER COUNTY, TEXAS |

DEFENDANTS' FIRST AMENDED MOTION FOR SUMMARY JUDGMENT

(Filed Mar. 1, 1995)

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Defendants, Jasper Hospital District and Jasper Memorial Hospital, and file this their First Amended Motion for Summary Judgment, and would show unto the Court as follows:

I.

AGREEMENT FOR EXPEDITED DISPOSITION

During this Court's hearing on Friday, February 24, 1995, all parties agreed to waive time constraints surrounding the summary judgment procedure. Attorneys for Plaintiff and Defendants agreed to submit briefs to the Court for an expedited ruling.

II.

INCORPORATION OF PRIOR MOTION FOR SUMMARY JUDGMENT

Defendants fully incorporate herein Defendants' Motion for Summary Judgment which was submitted to the Court on or about February 2, 1995. Defendants fully incorporate all basis and grounds for the Summary Judgment as well as the attached evidence (Exhibit A: Affidavit of Robert Hall and Exhibit 1 to Exhibit A: Jasper Hospital District Statute). Defendants file this Amended Motion for Summary Judgment and include additional grounds in support of this motion.

III.

NO JUSTICIABLE CONTROVERSY

No lease exists at the present time. The parties have only signed a letter of intent. The letter of intent constitutes an offer setting forth the terms under which the Sisters of Charity of the Incarnate Word, Houston, Texas, will lease the Jasper Memorial Hospital and its clinics subject to negotiation of an execution of a definitive lease agreement. (*See* Exhibit A: Hall Affidavit.) This intent to lease is subject to future events and negotiations.

A justiciable controversy does not exist where an advisory opinion is being sought by a party premised upon the occurrence of future, hypothetical events. *Texstar North America, Inc. v. Ladd Petroleum Corp.*, 809 S.W.2d 672, 679 (Tex. App. – Corpus Christi 1991, writ denied). (Future proposals did not create a justiciable controversy.) Courts may not give advisory opinions or decide

cases upon speculative, hypothetical, or contingent situations. *Scurlock Permian Corp. v. Brazos County*, 869 S.W.2d 478, 487 (Tex. App. – Houston [1st. Dist.] 1993, writ denied).

The proposed lease is contingent upon future negotiations and agreements concerning lease terms. As a result, no justiciable controversy exists and this Court should dismiss Plaintiff's suit.

## IV.

## NO TAXPAYER STANDING

During this Court's hearing on Friday, February 24, 1995, Plaintiff claimed that he had standing, as a taxpayer, to assert an Establishment Clause challenge. Plaintiff overstated the limited holding of *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942 20. L.Ed.2d 947 (1968).

In *Flast*, taxpayer plaintiffs sought to enjoin the expenditure of federal funds under the Elementary and Secondary Education Act of 1965. Plaintiffs alleged that these funds were being used to support religious schools in violation of the Establishment Clause. *Flast* developed a two part test to determine whether a taxpayer plaintiff has standing. First, a taxpayer may be a proper party to allege unconstitutionality *only* of exercises of *congressional power* under the Taxing and Spending Clause of Art. I, § 8 of the Constitution. Second, a taxpayer must show that the challenged enactment exceeds specific constitutional limitations upon the exercise of the taxing and spending power and not simply that the enactment is generally beyond the powers delegated to Congress by Art. I, § 8.

*See Valley Forge Christian College v. Americans United, etc.*, 454 U.S. 464, 102 S.Ct. 752, 762, 70 L.Ed.2d 700 (1982).

Like the plaintiffs in *Valley Forge*, the Plaintiff fails the first prong of the test for taxpayer standing in two respects. First, the source of his complaint is not congressional action. Instead, he challenges a decision of a state hospital district to lease its hospital. Second, the lease is not an exercise of authority conferred by the Taxing and Spending Clause of Art. I, § 8. *Valley Forge*, 102 S.Ct. at 762. Additionally, *Flast* only governs the jurisdiction of a federal court to hear certain cases and controversies. It does not bind state court jurisdiction.

The summary judgment evidence (Exhibit A: Hall Affidavit, paragraph 8) also establishes that no tax money is committed or pledged to pay the proposed lessee. A plaintiff's status as a taxpayer is irrelevant for standing purposes if no tax money is spent on the allegedly unconstitutional activity. *American Civil Liberties Union v. City of St. Charles*, 794 F.2d 265, 267 (7th Cir.) *cert. den'd* 479 U.S. 961, 107 S.Ct. 458, 93 L.Ed.2d 403 (1986).

Plaintiff also cited *Smith v. County of Albemarle*, 895 F.2d 953 (4th Cir. 1990). In *Smith*, taxpayers and residents of the defendant county sued the county board of supervisors and alleged that erection of a nativity scene by local Jaycees on the front lawn of the county office building violated the establishment clause. Without significant discussion, the court held that the standing of the plaintiffs was established. *Smith* at 955 *citing Alleghenny County v. ACLU*, 492 U.S. 573, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989). In the case at hand, there are no allegations of religious symbols or displays which have the appearance

or effect of endorsing religion. As a result, the *Smith* case is not instructive on the standing issue before this Court.

At a minimum, Plaintiff seeking to establish standing must demonstrate that: (1) he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant; (2) the injury fairly can be traced to the challenged action; and (3) the injury is likely to be redressed by a favorable decision. *Valley Forge* 102 S.Ct. at 758. The Plaintiff fails to meet these standing requirements.

V.

NO STATE ACTION

The Plaintiff's alleged allegations do not question Defendant Jasper Hospital District's authority to lease the facility. Instead, the Plaintiff challenges their authority to lease to the Sisters of Charity of the Incarnate Word, Houston, Texas. The Plaintiff's First Amended Original Petition judicially admits that the Sisters of Charity of the Incarnate Word, Houston, Texas, is a Texas non-profit corporation. Plaintiff claims that the religious purposes of the Sisters of Charity of the Incarnate Word, Houston, Texas, violates the Establishment Clause. Furthermore he claims that the proposed lease will provide that SCH will not be required to provide services which violate SCH's ethical policies and religious and ethical directives for Catholic health facilities.

In his brief, Plaintiff claims that he will have a direct and concrete impact because the religious and ethical directive for the Catholic health facilities will prohibit

vasectomies, abortions, and tubal ligations at the leased facilities. Even if the Sisters of Charity prohibited such medical procedures, no state action would be involved. As a result, there would be no establishment clause violation.

Leasing of land by a hospital from a state agency is insufficient to convert a private hospital into one acting under color of state law. *Spencer v. Community Hospital of Evanston*, 393 Fed. Supp. 1072, 1077 (N.D. Ill. 1975). Furthermore, hospitals may refuse to permit sterilization even when such procedures are prohibited by the hospital on basis of religious beliefs or moral convictions. *See Chrisman v. Sisters of St. Joseph of Peace*, 506 F.2d 308 (9th Cir. 1979); *Allen v. Sisters of St. Joseph*, 361 F.Supp. 1212 (N.D. Tex. 1973) *appeal dismissed* 490 F.2d 81 (5th Cir. 1974), and *Taylor v. St. Vincent's Hosp.*, 523 F.2d 75 (9th Cir. 1975) *cert. den'd* 424 U.S. 948, 96 S.Ct. 1420, 47 L.Ed.2d 355 (1976). Conduct of private hospitals which lease government facilities does not constitute state action. *See Greco v. Orange Memorial Hosp. Corp.*, 512 F.2d 873 (5th Cir. 1975) *cert. den'd* 423 U.S. 1000, 96 S.Ct. 433, 46 L.Ed.2d 376 (1975). *See also Albright v. Longview Police Dept.*, 884 F.2d 835 (5th Cir. 1989).

## VI.

## NO ESTABLISHMENT CLAUSE VIOLATION

Plaintiff challenges the constitutionality of leasing the facility to a hospital which is managed by Sisters of the Roman Catholic Church. This issue was decided adverse to the Plaintiff's position many years ago. *See Lee v. Weisman*, ___ U.S. ___, 112 S.Ct. 2649, 2662 n. 1, 120

L.Ed.2d. 467 (1992). In *Bradfield v. Roberts*, 175 U.S. 291, 298, 20 S.Ct. 121, 124, 44 L.Ed. 168 (1899), the court held that it did not violate the Establishment Clause for Congress to construct a hospital building caring for poor patients, although the hospital was managed by Sisters of the Roman Catholic Church. The court reasoned "[sic] that the influence of any particular church may be powerful over the members of a non-sectarian and secular corporation, incorporated for a certain defined purpose and with clearly stated powers, is surely not sufficient to convert such a corporation into a religious or sectarian body.

A fixed principal in this field is the Supreme Court's consistent rejection of the argument that "any program which in some manner aids an institution with a religious affiliation" violates the Establishment Clause. *Mueller v. Allen*, 463 U.S. 388, 393, 103 S.Ct. 3062, 3066, 77 L.Ed.2d 721 (1983) *citing Bradfield v. Roberts*. It has long been established that the government may send a cleric, and indeed a clerical order to perform a wholly secular task. *Roemer v. Board of Public Works of Maryland*, 426 U.S. 736, 746, 96 S.Ct. 2336, 2344, 49 L.Ed.2d 179 (1976), *citing Bradfield v. Roberts*. The government must take a neutral position and must confine itself to secular objectives. *Roemer*, 96 S.Ct. at 2345.

The proposed lease satisfies the *Lemon* test. Under the *Lemon* analysis, a statute or practice which touches upon religion, if it is to be permissible under the Establishment Clause, must have a secular purpose; it must neither advance nor inhibit religion in its principal or primary effect; and it must not foster an excessive entanglement

with religion. *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 109 S.Ct. 3086, 3100, 106 L.Ed.2d 472 (1989).

Denominational hospitals have a constitutional right to freedom of religion. This right allows those with religious or moral scruples to refuse to perform sterilizations and abortions. *Chrisman* at 512. Essentially, the Plaintiff maintains that a denominational hospital must give up its rights of religion in order to lease the Jasper Memorial Hospital. Such a position is not neutral towards religion, but instead is hostile towards religion.

VII.

CONCLUSION

For these reasons, Defendants, Jasper Hospital District and Jasper Memorial Hospital, respectfully request this Court to grant Defendants' Motion to Dismiss, Motion for Plea in Abatement, Motion for Special Exceptions, and Motion for Summary Judgment.

Respectfully submitted,

ORGAIN, BELL & TUCKER, L.L.P.
470 Orleans
Beaumont, Texas 77701
(409) 838-6412
(409) 838-6959 FAX

By /s/ David J. Fisher
David J. Fisher
State Bar No. 07049525

ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE

I do hereby certify that a true and correct copy of the above and foregoing instrument has been forwarded to all counsel of record on this the 28th day of February, 1995.

/s/ David J. Fisher
David J. Fisher